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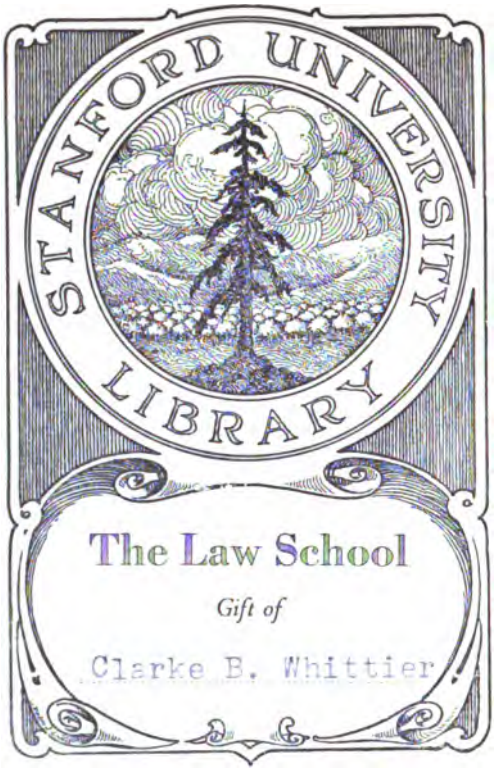
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Cases on Measure of Damages

I. INTRODUCTION.

GENERAL PRINCIPLES AND THEORY OF DAMAGES

1. *Injuria Sine Damno.*

WEBB *v.* PORTLAND MANUFACTURING CO.

Massachusetts, 1838. 3 Sumner, 189.

This is a bill in equity for an injunction to prevent the defendant from diverting a watercourse from the plaintiff's mill.

At the Saccarappi Falls, on the Presumpscut river, there were two successive falls, upon which were erected, about 40 or 50 rods apart, two milldams, called the upper and the lower dams, in the latter of which the plaintiff and the defendant were entitled to certain mill privileges. In order to supply water to its factory near the left bank of the river, the defendant opened a canal into the pond just below the upper dam, and returned the water thus withdrawn into the river below the lower dam, insisting upon its right so to divert the water because it was a small part only, (about one-fourth), of the water, to which defendant was entitled as mill owner on the lower dam.

STORY, J. The question, which has been argued upon the suggestion of the court, is of vital importance in the cause; and, if decided in favor of the plaintiff, it supersedes many of the inquiries, to which our attention must otherwise be directed. It is on this account, that we thought it proper to be argued, separately from the general merits of the cause.

The argument for the defendants then presents two distinct questions. The first is, whether, to maintain the present suit, it is essential for the plaintiff to establish any actual damage.

The second is, whether, in point of law, a mill-owner, having a right to a certain portion of the water of a stream for the use of his mill at a particular dam, has a right to draw off the same portion, or any less quantity of the water, at a considerable distance above the dam, without the consent of the owners of other mills on the same dam. In connection with these questions the point will also incidentally arise, whether it makes any difference, that such drawing off of the water above, can be shown to be no sensible injury to the other mill-owners on the lower dam.

As to the first question, I can very well understand that no action lies in a case where there is *damnum absque injuria*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable. See Mayor of Lynn v. Mayor of London, 4 Term. R. 130, 141, 143, 144; Com. Dig. "Action on the Case," B, 1, 2. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party is entitled to a verdict for nominal damages. *A fortiori*, this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such violation by an action, it is plain, that it may be lost or destroyed, without any possible remedial redress. In my judgment, the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.

So long ago as the great case of Ashby v. White, 2 Ld. Raym. 938, 6 Mod. 45, Holt, 524, the objection was put forth by some of the judges, and was answered by Lord HOLT, with his usual ability and clear learning; and his judgment was supported by the house of lords, and that of his brethren overturned. By the favor of an eminent judge, Lord HOLT'S opinion, apparently copied from his own manuscript, has been recently printed. In this last printed opinion, (page 14), Lord HOLT says: "It is impossible to imagine any such thing, as *injuria sine damno.* Every injury imports damage in the nature of it." S. P. 2 Ld. Raym. 955. And he cites many cases in support of his position. Among these is Starling v. Turner, 2 Lev. 50, 2 Vent. 25, where the plaintiff was a candidate for the office of bridgemaster of London bridge, and the lord mayor refused his demand of a poll; and it was determined, that the action was maintainable for the refusal of the poll. Although it might have been, that the plaintiff would not have been elected, the action was nevertheless maintainable; for the refusal was a violation of the plaintiff's right to be a candidate. So in the case cited, as from "23 Edw. III. 18, tit. Defense," (it is a mistake in the MS., and should be 29 Edw. III. 18*b*; Fitz. Abr. tit. "Defense," pl. 5), and 11 Hen. IV. 47, where the owner of a market, entitled to toll upon all cattle sold within the market, brought an action against the defendant, for hindering a person from going to the market with the intent to sell a horse, it was, on the like ground, held maintainable; for though the horse might not have been sold, and no toll would have become due; yet the hindering the plaintiff from the possibility of having toll was such an injury as did import such damage, for which the plaintiff ought to recover. So in Hunt v. Dowman, Cro. Jac. 478, 2 Rolle, 21, where the lessor brought an action against the lessee, for disturbing him from entering into the house leased, in order to view it, and to see whether any waste was committed; and it was held, that the action well lay, though no waste was committed and no actual damage done; for the lessor had a right so to enter, and the hindering of him was an injury to that right, for which he might maintain an action. So Herring v. Finch, 2 Lev. 250, where it was held, that a person entitled to vote, who was refused his vote at an election, might well maintain an action therefor, although the candidate for whom he might have voted might not have been chosen; and the voter could not sustain any percep-

tible or actual damage by such refusal of his vote. The law gives the remedy in such case; for there is a clear violation of the right. And his doctrine, as to a violation of the right to vote, is now incontrovertibly established; and yet it would be impracticable to show any temporal or actual damage thereby. See Harman v. Tappenden, 1 East, 555; Drewe v. Coulton, id. 563, note; Kilham v. Ward, 2 Mass. 236; Lincoln v. Hapgood, 11 Mass. 350; 2 Vin. Abr. "Actions," [Case] n. *c.* pl. 3. In the case of Ashby v. White, as reported by Lord RAYMOND (2 Ld. Raym. 953), Lord HOLT said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." S. P. 6 Mod. 53. The principles laid down by Lord HOLT are so strongly commended, not only by authority, but by the common sense and common justice of mankind, that they seem absolutely, in a juridical view, incontrovertible. And they have been fully recognized in many other cases. The note of Mr. Sergeant Williams to Mellor v. Spateman, 1 Saund. 346*a*, note 2; Wells v. Watling, 2 W. Bl. 1239; and the case of the Tunbridge Dippers, Weller v. Baker, 2 Wils. 414, are direct to the purpose. I am aware that some of the old cases inculcate a different doctrine, and perhaps are not reconcilable with that of Lord HOLT. There are also some modern cases, which at first view seem to the contrary. But they are distinguishable from that now in judgment, and if they were not, *ego assentior scoevoloe.* The case of Williams v. Morland, 2 Barn. & C. 910, seems to have proceeded upon the ground, that there was neither any damage nor any injury to the right of the plaintiff. Whether that case can be supported upon principle, it is not now necessary to say. Some of the *dicta* in it have been subsequently impugned; and the general reasoning of the judges seems to admit, that if any right of the plaintiff had been violated, the action would have lain. The case of Jackson v. Pesked, 1 Maule & S. 235, turned upon the supposed defects of the declaration, as applicable to a mere reversionary interest, it not stating any act done to the prejudice of that reversionary interest. I do not stop to inquire, whether there was not an over-nicety in the application of the technical principles of pleading to that case; although, notwithstanding the elaborate opinion of Lord ELLENBOROUGH, one

might be inclined to pause upon it. The case of Young v. Spencer, 10 Barn. & C. 145, turned also upon the point, whether any injury was done to a reversionary interest. I confess myself better pleased with the ruling of the learned judge (Mr. Justice BAYLEY,) at the trial, than with the decision of the court in granting a new trial. But the court admitted, that, if there was any injury to the reversionary right, the action would lie; and although there might be no actual damage proved, yet if anything done by the tenant would destroy the evidence of title, the action was maintainable. *A fortiori*, the action must have been held maintainable, if the act done went to destroy the existing right, or to found an adverse right.

On the other hand, Marzetti v. Williams, 1 Barn. & Adol. 415, goes the whole length of Lord HOLT'S doctrine; for there the plaintiff recovered, notwithstanding no actual damage was proved at the trial; and Mr. Justice TAUNTON on that occasion cited many authorities to show, that, where a wrong is done, by which the right of the party may be injured, it is a good cause of action, although no actual damage be sustained. In Hobson v. Todd, 4 Term R. 71, 73, the court decided the case upon the very distinction which is most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common. The same principle was afterwards recognized by Mr. Justice GROSS, in Pinder v. Wadsworth, 2 East, 162. But the case of Bower v. Hill, 1 Bing. N. C. 549, fully sustains the doctrine for which I contend; and, indeed, a stronger case of its application cannot well be imagined. There the court held, that a permanent obstruction to a navigable drain of the plaintiff's, though choked up with mud for sixteen years, was actionable, although the plaintiff received no immediate damage thereby; for, if acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. The case of Blanchard v. Baker, 8 Greenl. 253, 268, recognizes the same doctrine in the most full and satisfactory manner, and is directly in point; for it was a case for diverting water from the plaintiff's mill. I should be sorry to have it supposed, for a moment, that Tyler v. Wilkinson, 4 Mason, 397, imported a different doctrine. On the contrary, I have always considered it as proceeding upon the same doctrine.

Upon the whole, without going farther into an examination of the authorities on this subject, my judgment is, that whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damages. And, *a fortiori*, that this doctrine applies, whenever the act done is of such a nature, as that by its repetition or continuance it may become the foundation or evidence of an adverse right. See, also, Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1.

But if the doctrine were otherwise, and no action were maintainable at law, without proof of actual damage; that would furnish no ground why a court of equity should not interfere and protect such a right from violation and invasion; for, in a great variety of cases, the very ground of the interposition of a court of equity is, that the injury done is irremediable at law; and that the right can only be permanently preserved or perpetuated by the powers of a court of equity. And one of the most ordinary processes, to accomplish this end is by a writ of injunction, the nature and efficacy of which for such purpose, I need not state, as the elementary treatises fully expound them. See Eden, Inj.; 2 Story, Eq. Jur. c. 23, §§ 86-959; Bolivar Manuf'g Co. v. Neponset Manuf'g Co., 16 Pick. 241. If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiff, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendant from such an injurious act. If there be a remedy for the plaintiff at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiff. A court of equity will not indeed entertain a bill for an injunction in case of a mere trespass fully remediable at law. But if it might occasion irreparable mischief, or permanent injury, or destroy a right, that is the appropriate case for such a bill. See 2 Story, Eq. Jur. §§ 926-928, and the cases there cited; Jerome v. Ross, 7 Johns. Ch. 315; Van Bergen v. Van Bergen, 3 Johns. Ch. 282; Newburgh & C. Turnpike v. Miller, 5 Johns. Ch. 101; Gardner v. Village of Newburgh, 2 Johns. Ch. 162.

Let us come then, to the only remaining question in the cause; and that is, whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendant. And here it does not seem to me that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions, and much contrariety of opinion. The true doctrine is laid down in Wright v. Howard, 1 Sim. & S. 190, by Sir JOHN LEACH, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the king's bench. Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Ado. 1. See, also, Bealey v. Shaw, 6 East, 208. "*Prima facie,*" says that learned judge, "the proprietor of each bank of a stream is the proprietor of half of the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water, which flows in the stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations; no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above, or to diminish the quantity of water, which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same doctrine was fully recognized and acted upon in the case of Tyler v. Wilkinson, 4 Mason, 397, and also in the case of Blanchard v. Baker, 8 Greenl. 253, 266. In the latter case the learned judge, (Mr. Justice Weston), who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle, that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation, which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has

a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." Mr. Chancellor Kent has also summed up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries, (3 Kent's Comm. Lect. 42, p. 439, 3d ed.); and I scarcely know, where else it can be found reduced to so elegant and satisfactory a formulary. In the old books, the doctrine is quaintly, though clearly stated; for it is said, that a water-course begins *ex jure naturæ*, and having taken a certain course naturally, it cannot be [lawfully] diverted. "*Aqua currit, et debet currere, ut currere solebat.*" Shury v. Piggot, 3 Bulst. 339, Poph. 166.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water, as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert, or unreasonably to retard, this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above, to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being, that the right of a riparian proprietor arises by mere operation of law, as an incident to his ownership of the bank; and that of a mill-owner, as an incident to his mill. Bealey v. Shaw, 6 East, 208; Saunders v. Newman, 1 Barn. & Ald. 258; Mason v. Hill, 3 Barn. & Adol. 304, 5 Barn. & Adol. 1; Blanchard v. Baker, 8 Greenl. 253, 268; and Tyler v. Wilkinson, 4 Mason, 397, are fully in point. Mr. Chancellor Kent, in his Commentaries, relies on the same principles, and fully supports them by a large survey of the authorities. 3 Kent Comm. Lect. 52, pp. 441-445, 3d ed.

Now, if this be the law on this subject, upon what ground can the defendant insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said, that there is no perceptible damage done to the plaintiff. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiff to the full, natural flow of the stream; and may become the foundation of an adverse right in the defendant. In such a case, actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugi-

tive, temporary trespass, by diverting or withdrawing the water a short period, without damage, and without any pretense of right. In such a case the wrong, if there be no sensible damage and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case), be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend, how it can be assumed, in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water, which is permanently maintained. The necessary result of lowering the head of water permanently, would seem, therefore, to be a direct diminution of the value of the privileges. And if so, to that extent it must be an actual damage.

Again, it is said, that the defendants are mill-owners on the lower dam, and are entitled, as such, to their proportion of the water of the stream in its natural flow. Certainly they are. But where are they so entitled to take and use it? At the lower dam; for there is the place, where their right attaches, and not at any place higher up the stream. Suppose they are entitled to use, for their own mills on the lower dam, half the water which descends to it, what ground is there to say, that they have a right to draw off that half at the head of the mill-pond? Suppose, the head of water at the lower dam in ordinary times is two feet high, is it not obvious, that by withdrawing at the head of the pond one-half of the water, the water at the dam must be proportionately lowered? It makes no difference, that the defendants insist upon drawing off only one-fourth of what, they insist, they are entitled to; for, *pro tanto,* it will operate in the same manner; and if they have a right to draw off to the extent of one-fourth of their privilege, they have an equal right to draw off the full extent of it. The privilege, attached to the mills of the plaintiff, is not the privilege of using half, or any other proportion merely, of water in the stream, but of having the whole stream, undiminished in its natural flow, come to the lower dam with its full power, and

there to use his full share of the water power. The plaintiff has a title, not to a half or other proportion of the water in the pond, but is, if one may so say, entitled *per my et per tout* to his proportion of the whole bulk of the stream, undivided, and indivisible, except at the lower dam. This doctrine, in my judgment, irresistibly follows from the general principles already stated; and what alone would be decisive, it has the express sanction of the supreme court of Maine, in the case of Blanchard v. Baker, 8 Greenl. 253, 270. The court there said, in reply to the suggestion, that the owners of the eastern shore had a right to half the water, and a right to divert it to that extent: "It has been seen, that, if they had been owners of both sides, they had no right to divert the water without again returning it to its original channel, (before it passes the lands of another proprietor). Besides, it was impossible, in the nature of things, that they could take it from their side only. An equal portion from the plaintiff's side must have been mingled with all that was diverted."

A suggestion has also been made, that the defendants have fully indemnified the plaintiff from any injury, and in truth have conferred a benefit on him, by securing the water by means of a raised dam, higher up the stream, at Sebago pond, in a reservoir, so as to be capable of affording a full supply in the stream in the dryest seasons. To this suggestion several answers may be given. In the first place, the plaintiff is no party to the contract for raising the new dam, and has no interest therein; and cannot, as a matter of right, insist upon its being kept up, or upon any advantage to be derived therefrom. In the next place, the plaintiff is not compellable to exchange one right for another; or to part with a present interest in favor of the defendants at the mere election of the latter. Even a supposed benefit cannot be forced upon him against his will; and, certainly, there is no pretense to say, that, in point of law, the defendants have any right to substitute, for a present existing right of the plaintiff's, any other, which they may deem to be an equivalent. The private property of one man cannot be taken by another, simply because he can substitute an equivalent benefit.

Having made these remarks upon the points raised in the argument, the subject, at least so far as it is at present open for the consideration of the court, appears to me to be exhausted.

Whether, consistently with this opinion, it is practicable for the defendants successfully to establish any substantial defense to the bill, it is for the defendants, and not for the court, to consider.

I am authorized to say that the district judge concurs in this opinion.

Decree accordingly.

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2. *Damnum Absque Injuria.*

THURSTON *v.* HANCOCK.

Massachusetts, 1815. 12 Mass. 220.

This was an action on the case.

A trial was had upon the issue of not guilty, November, 1813, and a verdict found for the defendants, was to be set aside, and a new trial granted, if in the opinion of the court the plaintiff was entitled to maintain his action upon the following state of facts reported by the judge who sat in the trial: viz. That the plaintiff in the year 1802, purchased a parcel of land upon Beacon Hill, so called, in Boston, bounded westwardly on land belonging to the town of Boston on said hill, eastwardly on Bowdoin street so called, and northwardly and southwardly on land of D. D. Rogers. That afterwards in the year 1804, the plaintiff erected a valuable brick dwelling house thereon, which stood at the distance of forty feet from the northern and southern bounds of his land; the back of said house being about two feet from the western bounds of said land. That the foundation of said house was placed about fifteen feet below the ancient surface of the land. That the plaintiff with his family occupied said house and land, from December, 1804, until they were obliged to remove therefrom, as hereafter mentioned. That the defendants commenced digging and removing the gravel from the side of said hill in the year 1811. That on January 27, 1811, the plaintiff gave them written notice that his house was endangered thereby. That the defendants notwithstanding continued to dig and carry away the earth and gravel from the hill, until the commencement of this action. That the only land belonging to the defendants, which adjoined to the said house and land of the plaintiff, was purchased by them of the town of Boston, and conveyed by deed dated August 6, 1811. That

the land thus bought consisted of a lot about 100 feet square, upon the top of said hill, and a right in a highway 30 feet wide, leading to it from Sumner street. That this lot and highway were laid out by said town more than sixty years since, for the purpose of erecting a beacon, and have never been used for any other purpose, except the erection of a monument. That the town derived its title to said land from long continued possession for the purpose aforesaid. That all these facts were known to the defendants, before they purchased said land of the town. That this land adjoined the plaintiff's house and land on the western side, and at the time of suing out the plaintiff's writ the defendant's digging and removal of the earth as aforesaid had approached on the surface within five or six feet of the plaintiff's house on the western side thereof, and in some places the earth had, by reason of said digging and removal, fallen from the walls thereof. That the defendants had dug and carried away the earth near the northwestwardly corner of said house to the depth of 45 feet, and on the western side thereof to the depth of 30 feet, below the natural surface of their own as well as of the plaintiff's land. That the earth dug and removed by the defendants as aforesaid was upon and from their said land next adjoining the plaintiff's land. That by reason of the digging and removing of the earth as aforesaid, to the depth aforesaid, below the ancient surface of the earth, a part of the plaintiff's earth and soil, on the surface of his said land, had fallen away and slidden upon the defendant's land; and the foundation of the plaintiff's house was rendered insecure, and it became and was at the time of commencing this action, unsafe and dangerous to dwell in said house; and the plaintiff was obliged to quit and abandon the same, previous to his commencing this action, and afterwards to take it down in order to save the materials thereof.

PARKER, C. J. The facts agreed present a case of great misfortune and loss, and one which has induced us to look very minutely into the authorities, to see if any remedy exists in law against those who have been the immediate actors in what has occasioned the loss: but after all the researches we have been able to make, we cannot satisfy ourselves that the facts reported will maintain this action.

The plaintiff purchased his land in the year 1802, on the summit of Beacon Hill, which has a rapid declivity on all sides. In

1804 he erected a brick dwelling-house and outhouses on this lot; and laid his foundation, on the western side, within two feet of his boundary line. The inhabitants of the town of Boston were at that time the owners, either by original title or by an uninterrupted possession for more than sixty years, of the land on the hill lying westwardly of the lot purchased by the plaintiff. On the 6th of August, 1811, the defendants purchased of the town the land situated westwardly of the said lot owned by the plaintiff; and in the same year commenced levelling the hill, by digging and carrying away the gravel: they not actually digging up to the line of division between them and the plaintiff; but keeping five or six feet therefrom. Nevertheless by reason of the slope of the hill, the earth fell away, so as in some places to leave the plaintiff's foundation wall bare, and so to endanger the falling of his house, as to make it prudent and necessary, in the opinion of skillful persons, for the safety of the lives of himself and his family, to remove from the house; and in order to save the materials, to take down the house, and to rebuild it on a safer foundation. The defendants were notified of the probable consequences of thus digging by the plaintiff, and were warned that they would be called upon for damages, in case of any loss.

The manner in which the town of Boston acquired a title to the land, or to the particular use to which it was appropriated, can have no influence upon the question; as the fee was in the town, without any restriction as to the manner in which the land should be used or occupied.

It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it.

The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property, or impair any actual existing rights of another. *Sic utere tuo ut alienum non lædas.* Thus no man, having land adjoining his neighbor's which has been long built upon, shall erect a building in such manner as to interrupt the light or the air of his neighbor's house, or expose it to injury from the weather, or to unwholesome smells.

But this subjection of the use of a man's own property to the convenience of his neighbor, is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privilege, which by such act is impaired. Therefore it is that by the ancient common law no man could maintain an action against the owner of an adjoining tract of land, for interrupting the passage of the light or the air to a tenement, unless the tenement thus affected was ancient: so that the plaintiff could prescribe for the privilege, of which he had been deprived; upon the common notion of prescription, that there was formerly a grant of the privilege, which grant has been lost by lapse of time, although the enjoyment of it has continued.

Now in such case of a grant presumed, it shall for the purposes of justice be further presumed, that it was from the ancestor of the man interrupting the privilege; or from those whose estate he has; so as to control him in the use of his own property, in any manner that shall interfere with or defeat an ancient grant thus supposed to have been made. This is the only way of accounting for the common-law principle, which gives one neighbor an action against another, for making the same use of his property which he has made of his own. And it is a reasonable principle: for it would be exceedingly unjust that successive purchasers or inheritors of an estate for the space of sixty years, with certain valuable privileges attached to it, should be liable to be disturbed by the representatives or successors of those who originally granted or consented to, or acquiesced in the use of the privilege.

It is true that of late years the courts in England have sustained actions for the obstruction of such privileges of much shorter duration than sixty years. But the same principle is preserved of the presumption of a grant. And indeed the modern doctrine, with respect to easements and privileges, is but a necessary consequence of the late decisions, that grants and title deeds may be presumed to have been made, although the title or privilege claimed under them is of a much later date than the ancient time of prescription.

The plaintiff cannot pretend to found his action upon this principle; for he first became proprietor of the land in 1802, and built his house in 1804, ten years before the commencement of his suit. So that if the presumption of a grant were not defeated by showing the commencement of his title to be

so recent; yet there is no case, where less than twenty years has entitled a building to the qualities of an ancient building, so as to give the owner a right to the continued use of privileges, the full enjoyment of which necessarily trenches upon his neighbor's right to use his own property in the way he shall deem most to his advantage. A man who purchases a house, or succeeds to one, which has the marks of antiquity about it, may well suppose that all its privileges of right appertain to the house: and indeed they could not have remained so long without the culpable negligence, or friendly acquiescence of those, who might originally have had a right to hinder or obstruct them. But a man who himself builds a house, adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land; and by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience.

This seems to be the result of the cases anciently settled in England, upon the subject of nuisance or interruption of privileges and easements: and it seems to be as much the dictate of common sense and sound reason, as of legal authortiy.

The decisions cited by the counsel for the plaintiff, (1 Domat, 309, 408; Fitz. N. B. 183; 9 Co. 59; Palmer, 536; 1 Roll. Abr. 140; ibid. 430; Slingsby v. Barnard, 1 Roll. Rep. 88; 2 Roll. Abr. 565; 2 Saund. 697; Co. Lit. 56; 1 Burr, 337; 6 D. & E. 411; 7 East, 368; 1 B. & P. 405; 3 Wils. 461), in support of this action, generally go to establish only the general principle, that a remedy lies for one who is injured consequentially by the acts of his neighbor done on his own property. The civil-law doctrine cited from Domat will be found upon examination to go no further than the common law upon this subject. For although it is there laid down, that new works on a man's ground are prohibited, provided they are hurtful to others, who have a right to hinder them: and that the person erecting them shall restore things to their former state, and repair the damages; from whence probably the common-law remedy of abating a nuisance as well as recovery of damages; yet this is subsequently explained and qualified in another part of the same chapter, where it is said, that if a man does what he has a right to do upon his own land, without trespassing upon any law, custom, title or possession, he is not liable to damage for injurious consequences; unless he does it, not for his own ad-

vantage, but maliciously; and the damages shall be considered as casualties for which he is not answerable.

The common law has adopted the same principles, considering the actual enjoyment of an easement for a long course of years, as establishing a right which cannot with impunity be impaired by him who is the owner of the land adjoining.

The only case cited from common-law authorities, tending to show that a mere priority of building operates to deprive the tenant of an adjoining lot of the right of occupying and using it at his pleasure, without being subjected to damages if by such use he should injure a building previously erected, is that of Slingsby v. Barnard, cited from Rolle. Sir John Slingsby brought his action on the case against Barnard and Ball, and declared that he was seized of a dwelling-house *nuper edificatus.* and that Barnard was seized of a house next adjoining; and that Barnard and Ball under him, in making a cellar under Barnard's house, dug so near the foundation of the plaintiff's house, that they undermined the same, and one-half of it fell. Judgment upon this declaration was for the plaintiff, no objection having been made as to the right of action, but only to the form of the declaration.

The report of this case is very short and unsatisfactory; it not appearing whether the defendant confined himself in his digging to his own land, or whether the house then lately built was upon a new or an old foundation. Indeed it seems impossible to maintain that case upon the facts made to appear in the report, without denying principles, which seem to have been deliberately laid down in other books, equally respectable as authorities.

Thus in Siderfin 167, upon a special verdict the case was thus. A having a certain quantity of land, erected a new house upon part of it, and leased the house to B and the residue of the land to C who put logs and other things upon the land adjoining said house, so that the windows were darkened, etc. It was holden that B could maintain case against C for this injury. But the reason seems to be that C took his lease seeing that the house was there, and that he should not, any more than the lessor, render the house first leased less valuable by his obstructions. It was however decided in the same case, that if one seized of land lease forty feet of it to A to build upon, and another forty feet to B to build upon, and one builds a house, and

then the other digs a cellar upon his ground, by which the wall of the first house adjoining falls, no action lies; and so, they said, it was adjudged in Pigott & Suries case, for each one may make what advantage he can of his own. The principle of this decision is, that both parties came to the land with equal rights in point of time and title; and that he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it by setting his house sufficiently within his line to avoid the mischief. In the same case it is stated, as resolved by the court, that if a stranger have the land adjoining to a new house, he may build new houses, etc., upon his land, and the other shall be without remedy, when the lights are darkened: otherwise when the house first built was an ancient one.

In Rolle's Abridgment, 565, A, seized in fee of copyhold estate, next adjoining land of B, erects a new house upon his copyhold land, and a part is built upon the confines next adjoining the land of B, and B afterwards digs his land so near the house of A, but on no part of his land, that the foundation of the house, and even the house itself fall; yet no action lies for A against B, because it was the folly of A, that he built his house so near to the land of B. For by his own act he shall not hinder B from the best use of his own land that he can. And after verdict, judgment was arrested. The reporter adds however, that it seems that a man, who has land next adjoining my land, cannot dig his land so near mine, as to cause mine to slide into the pit; and if an action be brought for this, it will lie.

Although at first view the opinion of Rolle seems to be at variance with the decision which he has stated, yet they are easily reconciled with sound principles. A man in digging upon his own land is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages: but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest.

If this be the law, the case before us is settled by it: and we

have not been able to discover that the doctrine has ever been overruled, nor to discern any good reason why it should be.

The plaintiff purchased his land in 1802. At that time the inhabitants of Boston were in possession, and the owners of the adjoining land now owned by the defendants. The plaintiff built his house within two feet of the western line of the lot, knowing that the town, or those who should hold under it, had a right to build equally near to the line, or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations. He built at his peril: for it was not possible for him, merely by building upon his own ground, to deprive the other party of such use of his, as he should deem most advantageous. There was no right acquired by his ten years' occupation, to keep his neighbor at a convenient distance from him. He could not have maintained an action for obstructing the light or air: because he should have known that, in the course of improvements on the adjoining land, the light and air might be obstructed. It is in fact *damnum absque injuria.*

By the authority above cited however, it would appear that for the loss of, or injury to the soil merely, his action may be maintained. The defendants should have anticipated the consequence of digging so near the line; and they are answerable for the direct consequential damage to the plaintiff, although not for the adventitious damage arising from his putting his house in a dangerous position.

Note. "The doctrine of *damnum absque injuria* is recognized as fundamental in New York and Federal courts." Muhlker v. Harlem R. R. Co., 197 U. S. 557.

II. CLASSIFICATION OF DAMAGES.

1. *Nominal Damages.*

WOOD *v.* WAUD.

Exchequer, 1849. 3 Ex. 748.

POLLOCK, C. B. * * * The fact, as found by the jury, is, that the defendants (whose works have been erected within twenty years, and who have no right, by long enjoyment or grant, so to do) have fouled the water of the natural stream by pouring in soap suds, woolcombers' suds, etc.; but that pollution of the natural stream has done no actual damage to the plaintiffs, because it was already so polluted by similar acts of millowners above the defendant's mills, and by dyers still further up the stream, and some sewers of the town of Bradford; that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land, on which the watercourse flowed, as will be hereafter more fully stated; and that right continues, except so far as it may have been derogated from by user or by grant to the neighboring landowners.

This is a case, therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dyeworks and other manufactories, and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plaintiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which then would do serious damage to them. We think, therefore, that the verdict must

be entered for the plaintiffs on every part of not guilty to the first count. * * *

Note. Where there has been an injury to a right, an action lies, though there has been no appreciable damage. Alexander v. Kerr, 2 Rawle, 83; Parker v. Griswold, 17 Conn. 288.

JEWETT *v.* WHITNEY.

Maine, 1857. 43 Me. 242.

This action is trespass *quare clausum* and comes on report of MAY, J., presiding at *nisi prius*.

The plaintiff for some time prior to July, 1834, had been in possession of the mill, which is the property in dispute, taking one-half of the profits of the same, at which time the defendant took possession of plaintiff's part, and received his proportion of the earnings. The mill was soon torn down and rebuilt by defendant and his co-tenants, using so much of the old as was proper for the new mill. Whereupon this action is brought for expelling the plaintiff, tearing down the mill, converting the same, etc.

MAY, J. * * * The only remaining question is that of damages. The proof shows that the mill, standing on the premises at the time when the defendant took possession, in July, 1854, had become nearly worthless. It was so rotten that it could not be repaired, and the witness, Lebroke, testifies that it was almost impossible to use it. In its then condition the profits of it could not have exceeded the cost of the repairs. Under these circumstances the defendant co-operated with the co-tenants of the plaintiff in tearing down the old mill and erecting, at an expense of more than two thousand dollars, a new one in its stead. So far as the materials obtained from the old mill were of value, and would answer, they were put into the new. While the plaintiff may, possibly, have lost some immediate profits, before the date of his writ, by his expulsion from the mill, he has largely gained in the increased value of his estate. His damages, therefore, can be only nominal.

Judgment for the plaintiff for one dollar.

TUFTS *v.* BENNETT.

Massachusetts, 1895. 163 Mass. 398.

Contract. To recover the purchase price of goods sold by the plaintiff to the defendant. Judgment was given for the plaintiff in the sum of one dollar. The plaintiff alleged exceptions.

MORTON, J. * * * Part of the goods ordered were kept in stock by the plaintiff, part were to be manufactured by him, part to be purchased elsewhere, and some labor and stock were to be expended in renovating certain apparatus for the defendant. * * *

According to the contract the defendant, upon delivery, was to honor a sight draft for $400, and to execute to the plaintiff notes for the balance, and the title to the goods was to remain in the plaintiff till the notes were paid. The defendant has never honored any draft nor executed any notes, and the action is brought for the breach of his agreement in failing to do so. The court found that the defendant had repudiated the contract.

The rule seems to be pretty clearly established that the measure of damages in such a case is the difference beween the market value of the goods at the time and place of delivery and the contract price. (Citing authorities.)

No evidence, however, was introduced by the plaintiff as to such difference, he relying apparently upon his contention that the measure of damages was the contract price. The only thing, therefore, which the court could do, was to award nominal damages, which it did. *Exceptions overruled.*

LOWE *v.* TURPIE.

Indiana, 1896. 147 Ind. 652.

Plaintiff contracted to pay certain debts, liens, on real property held by him as security and belonging to Turpie, but afterward refused to do so. The realty was subsequently sold to pay these obligations, and Turpie sues for damages by reason thereof. He was aware of Lowe's refusal to perform prior to the time of the bringing of the suits to enforce the incumbrances.

MONKS, J. * * * It is clear, we think, that the measure

of damages for the breach by appellant of his agreement to advance money to pay liens, etc., set forth in the finding, is the same as for breach of a contract to loan money direct. * * *

It is the rule, settled beyond controversy, that the damages to be recovered must be the natural and proximate consequences of the breach of the contract. Damages which are remote or speculative cannot be recovered. (Citing authorities).

When one is indebted to another, and fails to pay the same when due, the damages for the delay in payment are provided for in the allowance of interest. This is the measure of damages adopted by the law in all actions by the creditor against his debtor. (Citing authorities).

Appellees admit the measure of damages for the failure of a debtor to pay money when due to be as stated, but insist that where the obligation to pay money is special, and has reference to other objects than the mere discharge of debts,—as in this case, to advance or loan money to pay taxes and discharge liens,—damages beyond interest for delay of payment, according to the actual injury, may be recovered; citing 1 Sutherland on Damages p. 164 § 77, where the rule stated by appellees is approved. The author, however, in the same section, says: "Where one person furnishes money to discharge an incumbrance upon the land of the person furnishing the money, and the person undertaking to discharge it neglects to do so, and the land is lost to the owner by reason of the neglect, the measure of damages may be the money furnished, with interest, or the value of the land, according to circumstances. If the landowner has knowledge of the agent's failure in time to redeem the land himself, the damages will be the money furnished, with interest. But if the landowner justly relies upon his agent to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, the latter will be liable for the value of the land at the time it was lost." See Fontaine v. Lumber Co., 109 Mo. 55.

In Blood v. Wilkins, 43 Iowa, 565, Blood was the owner of certain land in Jones county, and conveyed the same to Wilkins as security for money advanced and to be advanced by Wilkins, and applied in payment of certain mortgages and tax liens upon

the property. Part of the money was paid out directly by Wilkins in discharge of liens, and a part was retained by him. At the time of the loan the land had been sold for taxes, but the period for redemption had not yet expired. The amount borrowed was enough to discharge all liens, and to redeem from said sales. Wilkins, after the execution of said deed given as security, retained in his hands the money necessary to redeem, under an agreement with Blood that he would redeem. Wilkins failed to redeem, and tax titles accrued against the land, whereby it was lost to Blood, except 40 acres. The court, in speaking of the measure of damages, said: "There only remains to be considered what is the measure of liability. When one person furnishes the money to another to discharge an incumbrance from the land of the person furnishing the money, and the person undertaking to discharge the incumbrance neglects to do it, and the land is lost to the owner by reason of the incumbrance, the measure of damages may be the money furnished, with interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of his agent's failure in time to redeem the land himself, his damages will be the money furnished, with interest. But if the landowner justly relies upon his agent, to whom he has furnished money to discharge the incumbrances, and the land is lost without his knowledge, and solely through the fault of the agent, then the agent will be liable for the value of the land lost." This language was adopted by the author of Sutherland on Damages, in stating the rule. See 1 Sutherland Damages, p. 164, § 77. * * *

We think the rule concerning the measure of damages in cases where one person furnishes the money to another to discharge liens on the land of the one furnishing the money is correctly stated in Blood v. Wilkins, *supra*.

In an action for breach of a contract to loan money to pay liens or incumbrances, no more than nominal damages can be recovered unless the facts showing special damages are alleged and proven. Turpie v. Lowe, *supra*.

When the person who contracted to make the loan neglects or refuses to do so, and the owner is compelled to procure the money elsewhere, the measure of damages is the difference, if any, between the interest he contracted to pay, and what he was compelled to pay to procure the money; not exceeding, perhaps, the highest rate allowed by law. 2 Sedg. Dam. § 622.

It is not necessary to determine whether the measure of damages for breach of a contract to loan money to pay liens in case the land is lost is the same as in a case of the neglect of one to whom money is furnished by the landowner to pay liens or incumbrances, for the reason that, if it were conceded that the measure of damages in this case was the same as it would have been had the Turpies furnished appellant the money to discharge all said debts and incumbrances, yet, under the facts as stated in the special finding, the Turpies would not be entitled to special damages. * * *

To entitle any one to recover more than nominal damages for a breach of contract to loan money to pay incumbrances, it is necessary not only to allege and prove the contract to loan the money, and its breach, and that the person who agreed to make the loan knew the purpose for which it was to be used, and the necessity therefor, but also that the land was lost to the owner by reason of such liens or incumbrances, and without his knowledge, and solely through the fault of the person who was to loan the money, or, if the landowner had notice of the neglect or refusal to loan the money, that it was at such a time as to deprive him of the opportunity to procure the money elsewhere, and pay said liens or incumbrances, or redeem the land, if sold. * * *

In contemplation of law, money is always in the market, and procurable at the lawful rate of interest. And if the owner of real estate, who has a contract with another to loan him money to pay liens or incumbrances on his land, who refuses to do so, has knowledge of such refusal in time to give him an opportunity to seek for it elsewhere, the fact that he cannot procure the money, on account of being in embarrassed circumstances, will not entitle him to recover more than nominal damages; for the reason that no party's condition, in respect to the measure of damages, is any worse, for having failed in his engagement to a person whose affairs are embarrassed, than if the same result had occurred with one in prosperous or affluent circumstances. (Citing authorities). * * *

It follows, therefore, that upon the facts found the Turpies were not entitled to more than nominal damages for the breach by appellant of his contract to loan money to pay liens and incumbrances. As the Turpies were not entitled to recover for the breach of said contracts to loan money, it is not necessary

to determine whether or not the same are void for uncertainty. * * * For the reasons given the said four judgments are reversed.

THE COLUMBUS COMPANY, LIMITED *v.* CLOWES.

L. R. 1 K. B. 1903, 244.

WRIGHT, J. This a somewhat singular case, and one which, as far as I can ascertain, is not exactly covered by authority. The plaintiffs employed the defendant, who was an architect, to make plans of a building to be erected on a site of which the plaintiffs were the lessees. The defendant appears to have been informed by some person, who had no authority from the plaintiffs to give any such information, that the site in question was of certain dimensions, which were in fact considerably less than the real dimensions of the site. The defendant assumed this information to be correct, and, without taking any steps to measure and survey the site, drew his plans on that assumption. It is not contended that he was right in doing so, and I think it was practically admitted that it was his duty to have surveyed the site and measured it, and taken out the proper dimensions before proceeding with his plans. The consequences of the mistake might have been disastrous; but as a matter of fact the mistake had no effect on the position of the plaintiffs, except that they paid him for plans which were in fact incorrect. The plaintiffs contend that they are entitled to get back the amount which they have paid for the plans because the plans are worthless, and that therefore there is a total failure of consideration. Alternatively, they say that they are entitled to damages for the negligence of the defendant.

I have come to the conclusion that there was not a complete failure of consideration. The design of the plans is, I think, available to some extent for a site of the real size. The quantities have been taken out in accordance with the plans, and on the evidence I am of opinion that a small addition to those quantities would alone be necessary in case of a building of the proper size. Borings have been made with a view to ascertaining the necessary depth for the foundations, and a good deal has been done which is really of the same value as if the plans had been correct. The plaintiffs' claim for damages has, however, to be considered. I think it is plain that they are entitled

to some damages. The defendant acted negligently, and in the cases such as those against solicitors where negligence is proved the plaintiff is entitled to some damages. But, in order to say what those damages should be, it is necessary to divide the case. With regard to the borings and other work done by the defendant, I think, as I have said, that the plaintiffs got full value. But what as to the plans themselves? I have no evidence before me that the plans, whether correct or not, have any value in themselves, and I am therefore thrown back on general principles. It seems to me that the most that the plaintiffs can get is the reasonable cost of making the plans good. But there comes the difficulty. The defendant himself would have made the plans good without any charge. Indeed, he would have been bound to do so. If, however, the plaintiffs had called in another architect, he would in all probability have insisted on commencing the plans *de novo,* and would have refused to make any use of the defendant's plans. But would that have been a reasonable course to pursue? I do not think that it would. One of the first principles of the law of damages is that a plaintiff who has suffered damage must act reasonably, and not incur unnecessary expense against the defendant. It is clear that the plaintiffs suffered no real damage, since they were never in a financial position to make use of the plans. I think, therefore, that they are only entitled to nominal damages.

The question of quantities is, however, on a different basis. They were necessary in order to enable the plaintiffs to get tenders for the execution of the work, and I think that the plaintiffs are clearly entitled to the cost of adapting them. The evidence shows me that the cost of doing so would be 40 l.; and I therefore give judgment for the plaintiffs for 40 l. in respect of the quantities, and 40s. in respect of the plans. Whether the action be one of contract or of tort, it is clearly one which is rightly brought in the High Court.

Judgment for plaintiffs.

In the old and leading case of Ashby v. White, 2 Ld. Raym. 938, Lord Chief Justice Holt held that if a free burgess of a municipal corporation has a right to vote for a member of the House of Commons and is refused this right by the election officer, an action on the case will lie against such officer.

In the celebrated case of the Tunbridge dippers, Weller v. Baker, 2 Wils. 414, where the plaintiff received only gratuities from visitors at

certain medicinal springs, it was held that an action would lie for disturbing the dippers in their employment, as an action on the case will lie for a possibility of a damage and injury.

In Hays v. W. & E. P. St. R. R. Co. 204 Pa. 488, it was held that where a railroad gets a right of way and agrees to make improvements, and subsequently abandons the location, the abutting owner can get nominal damages only.

In Dewire v. Hanley, 79 Conn. 454, where a right of way was obstructed, but no pecuniary loss or expense was shown, nominal damages were awarded.

In Owen v. O'Reilly, 20 Mo. 603, in an action for wages, where it was proved that services were rendered but no value was established, nominal damages were awarded.

But, where land was sold under false representations, which nevertheless did not result in actual loss to plaintiff, no damages were awarded, Thompson v. Newell, 118 Mo. App. 405.

In a case of nuisance, where no actual damage was shown, nominal damages were allowed. Swift v. Broyles, 115 Ga. 885.

Nominal damages may be awarded against a banker for refusing to honor his depositor's check, though no actual damage be shown at the trial: so held Lord Chief Justice TENTERDEN in Marzetti v. Williams, 1 Barn. & Adol. 415.

POLAND, J., in Paul v. Slason, 22 Vt. 231, says: "It is true, that by the theory of the law, wherever an invasion of a right is established, though no actual damage be shown, the law infers a damage * * * and gives nominal damages."

On the subject of nominal damages see also Six Carpenters Case, 8 Coke 432; Wartman v. Swindell, 54, N. J. L. 589; Chamberlain v. Parker, 45 N. Y. 569; State v. Davis, 117 Ind. 307; Jones v. King, 33 Wis. 422; Hopevale Electric Co. v. Electric Storage Battery Co. 184 N. Y. 356; Maher v. Wilson, 139 Cal. 514; Bourdette v. Sieward, 107 La. 258; Davis v. Ark. So. R. Co. 117 La. 320; Browning v. Simons, 17 Ind. 45; Grau v. Grau, 37 Ind. 635; Diers v. Edwards, 23 Ken. L. R. 500; Lance v. Apgar, 60 N. J. L. 447; N. J. School and Church Furniture Co. v. Board of Education, 58 N. J. L. 646; Boogher v. Bryant, 9 Mo. App. 592; Sproul v. Huston, 42 Wash. 106.

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2. *Avoidable Damages.*

CLARK *v.* MARSIGLIA.

New York, 1845. 1 Denio, 317.

Error from the New York common pleas. Marsiglia sued Clark in the court below in assumpsit, for work, labor, and materials, in cleaning, repairing, and improving sundry paint-

ings belonging to the defendant. The defendant pleaded *non assumpsit.*

The plaintiff proved that a number of paintings were delivered to him by the defendant to clean and repair, at certain prices for each. They were delivered upon two occasions. As to the first parcel, for the repairing of which the price was seventy-five dollars, no defence was offered. In respect to the other, for which the plaintiff charged one hundred and fifty-six dollars, the defendant gave evidence tending to show that after the plaintiff had commenced work upon them, he desired him not to go on, as he had concluded not to have the work done. The plaintiff, notwithstanding, finished the cleaning and repairing of the pictures, and claimed to recover for doing the whole, and for the materials furnished, insisting that the defendant had no right to countermand the order which he had given. The defendant's counsel requested the court to charge that he had the right to countermand his instructions for the work, and that the plaintiff could not recover for any work done after such countermand.

The court declined to charge as requested, but, on the contrary, instructed the jury that inasmuch as the plaintiff had commenced the work before the order was revoked, he had a right to finish it, and to recover the whole value of his labor and for the materials furnished. The jury found their verdict accordingly, and the defendant's counsel excepted. Judgment was rendered upon the verdict.

PER CURIAM. The question does not arise as to the right of the defendant below to take away these pictures, upon which the plaintiff had performed some labor, without payment for what he had done, and his damages for the violation of the contract, and upon that point we express no opinion. The plaintiff was allowed to recover as though there had been no countermand of the order; and in this the court erred. The defendant, by requiring the plaintiff to stop work upon the paintings, violated his contract, and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract: but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been.

To hold that one who employs another to do a piece of work is

bound to suffer it to be done at all events, would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year his situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable in him to stop the work, and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence; but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied when he is fully recompensed for his part performance and indemnified for his loss in respect to the part left unexecuted; and to persist in accumulating a larger demand is not consistent with good faith towards the employer. The judgment must be reversed, and a *venire de novo* awarded.

Judgment reversed.

SULLIVAN *v.* McMILLAN.

Florida, 1896. 37 Fla. 134.

McMillan and Wiggins agreed to cut and deliver to Sullivan, since deceased, all the logs of certain specified dimensions and free from certain specified defects growing upon certain described lands of the decedent. Many logs were duly delivered pursuant to the contract; but, following the death of Sullivan, his representative refused to receive any further logs, whereupon this action was brought for damages sustained by McMillan and Wiggins under the contract. The appellants sought to prove what gains and profits were made by the appellees by their own labor and the use of teams in such other work and contracts during the time that it would have taken them to perform the contract with the appellant's testator, and for the breach of which the suit was brought. The Court below excluded such evidence.

LIDDON, J. It is urged by appellants that the plaintiffs, when they received notice that the defendants would not further comply with or perform the contract, should have done all that reasonably lay within their power to protect themselves from loss by seeking another contract of like character, and that, the

plaintiffs having sought and obtained such a contract immediately after the breach sued upon, the defendants were entitled to have a proportionate amount of the profits applied in mitigation of the damages for which they were liable. Otherwise it is contended that the plaintiffs would make two profits for the same time, and with the same teams, and that speculation would be substituted for compensation, which is the basis of the law of damages for breaches of contract. These propositions are undoubtedly correct when applied to some classes of cases. They have special reference to contracts for personal services, or for the use of some special instrumentality, either with or without connection with such personal services. Thus, in a contract for teaching in a school, which was broken by a refusal to receive the services, it was held to be the plaintiff's duty to make reasonable exertion to obtain other like employment in the same vicinity, and thus mitigate the damages. Gillis v. Space, 63 Barb. (N. Y.) 177; Benziger v. Miller, 50 Ala. 206. The same rule was laid down for a similar breach of a contract with an actress. Howard v. Daly, 61 N. Y. 362. Where the plaintiff, owner of a portable saw mill, agreed to remove it to the farm of the defendant, and to saw a stated number of logs, to be furnished by the defendant, during certain seasons of the year 1865, and the defendant, after furnishing a portion, broke his contract by refusing to furnish more of such logs, but during the time he (plaintiff) would have been engaged in sawing defendant's logs he was offered other employment of the same kind, so that his mill need not have been idle, it was held that the damages caused by the breach sued upon should have been mitigated. Heavilon v. Kramer, 31 Ind. 241. (Citing authorities.)

The contract which was broken in the present case was not one for personal services, nor one which the parties contemplated should be performed with any special means or instrumentality. It was simply a contract for the delivery of certain logs at a certain place, and might have been performed by the plaintiffs with their own teams and personal labor, or by any other means or agency to which they might have seen fit to intrust the performance of the same. There is nothing in the contract to show that the execution of the same required all or any great portion of the time or personal attention of both or either of the plaintiffs; or that it was impracticable for plaintiffs to be engaged in other business and the performance of other con-

tracts contemporaneously with the performance of the contract in controversy. We do not think the rule invoked as to mitigation of damages by subsequent earnings and profits applies to this case. A distinction is recognized between a case of the character of that now before us, and those to which we have alluded. (Citing authorities.)

There was no legal obligation upon the plaintiffs in this case to enter upon the performance of other contracts for the benefit of the defendants. The Supreme Court of Wisconsin, in Cameron v. White, 74 Wis. 425, where a contention like that of appellants in this case was made, as we think properly said: "As the plaintiffs could not enhance the damages against the defendant by their neglect to make the best of what they had on their hands, so they are not bound to lessen the damages by making other contracts, and performing them, and giving the benefit of the performance of such contracts to the defendant." A very full exposition of this subject, showing the difference in the rules applicable to contracts for personal service and those for the doing of a specific act, can be found in Watson v. Brick Co., 3 Wash. 283. This discussion is too lengthy to insert entire in this opinion. The gist of the whole matter, the conclusion of the court, citing Wolf v. Studebaker, 65 Pa. 459, is thus stated: "The duty to seek employment is dependent upon the original contract being one of employment or hire. It is not applicable to every contract. * * * Ordinary contracts of hire and contracts for the performance of some specified undertaking cannot be governed by the same rule. That in one case the party can earn no more than the wages, and if he gets that his loss will be but nominal; whereas, in the other case, the loss of the party is the loss of the benefit of the contract. The damages may be said to be fixed by the law of the contract the moment it is broken, and cannot be altered by collateral circumstances independent of and totally disconnected from it, and from the party occasioning it. To plead the doctrine of avoidable consequences to such case, * * * 'would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime.' * * * If the rule was to be observed that the damages proven must be direct and proximate, the same rule must be invoked in the reduction of damages." In Crescent Manuf'g Co. v. N. O. Nelson

Manuf'g Co., 100 Mo. 325, where an attempt was made to offer evidence similar to that excluded in the present case, it was said: "Where a servant is wrongfully discharged during his term, and lays his damages at the contract wages for the balance of the term, it is generally held that evidence may be introduced in mitigation of damages of what he might have earned in the interim by using reasonable efforts to procure other employment. So, in general, where a party has been injured or damaged by a breach of a contract, he should do whatever he can to lessen the injury. Many cases asserting these principles of law are cited by the defendant, but they have no application to the case in hand. The plaintiff owned its factory and the machinery, and the contract constituted no such relation as that of master and servant. It had the right to make as few or as many other contracts as it saw fit while executing the contract with defendant, and it is entitled to the profits which it might have made on this particular contract. The evidence offered in mitigation of damages was properly excluded." * * *

The second matter, as already stated, is whether any interest is recoverable, upon the amount of damages found by the jury against the defendants. "There are two tests which are constantly applied by the courts, having been found by them more useful than the attempted division into liquidated and unliquidated demands. Of these the first is whether the demand is of such a nature that its exact pecuniary amount was either ascertained or ascertainable by simple computation, or by reference to generally recognized standards, such as market price; second, whether the time from which interest, if allowed, must run—that is, a time of definite default or tort feasance,—can be ascertained."

Without setting forth even a brief summary of the evidence in the case, we think it is sufficient to say that it was so exact and definite as to the amount of damage sustained by the plaintiffs, and the elements of the same, that it only required a simple computation by the jury to fix the amount. We think the case falls within the rule stated, that the damages could be readily liquidated and ascertained by the jury by simple computation, and that the plaintiffs were entitled to interest thereon. * * *

Let the judgment of the Circuit Court be affirmed.

ZIBBELL *v.* CITY OF GRAND RAPIDS.

Michigan, 1902. 129 Mich. 661.

MONTGOMERY, C. J. Plaintiff recovered a judgment of $3,500, for injuries received by a fall on a sidewalk alleged to have been defective.

There was testimony that plaintiff, after receiving the injury, called a surgeon to treat her limb, and that he advised rest for the knee. There was also testimony that she did use her limb to some extent. The circuit judge charged: "The plaintiff is not entitled to recover any damages for any disability, suffering, or expense that resulted from her own failure to exercise proper and reasonable care after she received the injury of which she complains, which aggravated her condition, by failure to observe the instructions of her physician; and the city is not to be held responsible for any damages resulting from such neglect on her part." This instruction correctly embodied the law. Moore v. City of Kalamazoo, 109 Mich. 179; Reed v. City of Detroit, 108 Mich. 224. But the difficulty arises out of the fact that, when counsel attempted to argue this question to the jury, he was stopped with the statement that the court would charge that there was no act of the plaintiff which aggravated her condition. This was error. The testimony was for the jury, and, while it may not have been very convincing that she had been guilty of any imprudence, it should not have been wholly withdrawn from the consideration of the jury.

The other questions do not require discussion.

Judgment reversed, and new trial ordered.

LONG, J., did not sit. The other justices concurred.

It is the duty of plaintiff to minimize his losses and use due diligence to that end as well in case of breach of contract as in tort. WOODWARD, J., in Brown v. Weir, 95 App. Div. N. Y. 78.

3. *Compensatory Damages.*

ALLISON *v.* CHANDLER.

Michigan, 1863. 11 Mich. 542.

CHRISTIANCY, J. * * * The only question presented by the present bill of exceptions, and not already disposed of by our former decision, is the question of damages. * * * Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation—to say nothing of justice—does not sound policy require that the risk should be thrown upon the wrong doer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule. Certainty is doubtless very desirable in estimating damages in all cases: and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort, as well as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property; if the property (as it generally is) be such as can be readily obtained in the market and has a market value. But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. And, though a rule of certainty may be found which will measure a portion and only a portion of the damages, and exclude a very material portion, which it can be rendered morally certain the injured party has sustained, though its exact amount cannot be measured by a fixed

rule; here to apply any such rule to the whole case, is to misapply it: and so far as it excludes all damages which cannot be measured by it, it perpetrates positive injustice under the pretence of administering justice.

The law does not require impossibilities; and cannot therefore require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages, than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.

In the adoption of this course it will seldom happen that the court, hearing the evidence, will not thereby possess the means of forming a satisfactory judgment whether the damages are unreasonable, or exorbitant; and, if satisfied they are so, the court have always the power to set aside the verdict and grant a new trial.

The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term, by the defendant's act. This term was the property of the plaintiff; and, as proprietor, he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such sum—or the difference between the rent he was paying and the fair rental value of the premises—if the premises were of much greater and peculiar value to him, on account of the

business he had established in the store, and the resort of customers to that particular place, or the good will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store, and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of one thousand dollars per year; and he is ousted from the premises and this business entirely broken up for the balance of the time; can he be allowed to recover nothing but six cents damages for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages this assumption must be taken as a conclusive presumption of law. However such a presumption might be likely to accord with the fact in the city of New York, in most western cities and towns it would be so obviously contrary to the common experience of the facts, as to make the injustice of the rule gross and palpable. But we need not further discuss this point, as a denial of any such presumption was clearly involved in our former decision.

The plaintiff in this case did hire another store, "the best he could obtain, but not nearly so good for his business"—"his customers did not come to the new store, and there was

not so much of a thoroughfare by it, not one quarter of the travel, and he relied much upon chance custom, especially in the watch-repairing and other mechanical business." This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. This point also was decided in the former case, and we there further held that the declaration was sufficient to admit the proof of this species of loss.

Now if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business before the injury as well as after, not only might but should be shown, as an indispensable means of showing the amount of loss from the injury. If the business were a losing one to the plaintiff before, his loss from its being broken up or diminished (if anything) would certainly be less than if it were a profitable one. It is not the amount of business done, but the gain or profit arising from it, which constitutes its value. * * *

The other Justices concurred.

PARKER *v.* RUSSELL.

Massachusetts, 1882. 133 Mass. 74.

FIELD, J. In an action for the breach of a contract to support the plaintiff during his life, if the contract is regarded as still subsisting, the damages are assessed up to the date of the writ, and not up to the time when the verdict is rendered. Fay v. Guynon, 131 Mass. 31.

But if the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken by the defendant, and he elects so to treat it, the damages are assessed as of a total breach of an entire contract. Amos v. Oakley, 131 Mass. 413; Schell v. Plumb, 55 N. Y. 592; Remelee v. Hall, 31 Vt. 582; Fales v. Hemenway, 64 Maine, 373; Sutherland v. Wyer, 67 Maine, 64; Lamoreaux v. Rolfe, 36 N. H. 33; Mullaly v. Austin, 97 Mass. 30; Howard v. Daly, 61 N. Y. 362.

Such damages are not special or prospective damages, but are the damages naturally resulting from a total breach of the contract, and are suffered when the contract is broken, and are assessed as of that time. From the nature of the contract they include damages for not performing the contract

in the future as well as in the past. The value of the contract to the plaintiff at the time it is broken may be somewhat indefinite because the duration of the life of the plaintiff is uncertain, but uncertainty in the duration of a life has not, since the adoption of life tables, been regarded as a reason why full relief in damages should not be afforded for a failure to perform a contract which by its terms was to continue during life.

When the defendant, for example, absolutely refuses to perform such a contract after the time for entering upon the performance has begun, it would be a great hardship to compel the plaintiff to be ready at all times during his life to be supported by the defendant, if the defendant should at any time change his mind; and to hold that he must resort to successive actions from time to time to obtain his damages piecemeal, or else leave them to be recovered as an entirety by his personal representatives after his death.

Daniels v. Newton, 114 Mass. 530, decides that an absolute refusal to perform a contract before the performance is due by the terms of the contract is not a present breach of the contract for which any action can be maintained; but it does not decide that an absolute refusal to perform a contract after the time and under the conditions in which the plaintiff is entitled to require performance, is not a breach of the contract, even although the contract is by its terms to continue in the future.

The cases cited by the defendant are not inconsistent with these views. In Pierce v. Woodward, 6 Pick. 206, the declaration was for a breach of a negative promise, namely, "not to set up the business of a grocer" within certain limits; and it was held that the damages could be assessed only to the date of the writ. The defendant might at any time, without the consent of the plaintiff, stop carrying on the business, when the plaintiff's damages would necessarily cease.

Powers v. Ware, 4 Pick. 106, was an action of covenant broken, brought by the overseers of the poor, under the St. of 1793, c. 59, § 5, for the breach of a covenant to maintain an apprentice under an indenture of apprenticeship. The court in the opinion speak of the common-law rule in assessing damages only to the date of the writ. But the statute under which the action was brought prevented the overseers from treating the contract as wholly at an end, because it gave the apprentice

a right of action when the term is expired, "for damages for the causes aforesaid, other than such, if any, for which damages may have been recovered as aforesaid," that is, by the overseers.

Hambleton v. Veere, 2 Saund. 169, was an action on the case for enticing away an apprentice; and Ward v. Rich, 1 Vent. 103, was an action for abducting a wife; and neither throws much light on the rule of damages for breach of a contract.

Horn v. Chandler, 1 Mod. 271, was covenant broken upon an indenture of an infant apprentice, who under the custom of London had bound himself to serve the plaintiff for seven years; the declaration alleged a loss of service for the whole term, a part of which was unexpired; on demurrer to the plea, the declaration was held good, but it was said "that the plaintiff may take damages for the departure only, not the loss of service duing the term; and then it will be well enough." But if this be law to-day in actions on indentures of apprenticeship, it must be remembered that they are peculiar contracts, in which the rights and obligations of the parties are often affected by statutory regulations, and in some cases they cannot be avoided or treated as at an end at the will of the parties.

In this case, the declaration alleges in effect a promise to support the plaintiff during his life, from and after receiving the conveyance of certain real estate, an acceptance of such conveyance, and a neglect and refusal to perform the agreement. These are sufficient allegations to enable the plaintiff to recover damages as for a total breach. The court instructed the jury that, "if the defendant for a period of about two years neglected to furnish aid or support to the plaintiff, without any fault of the plaintiff, the plaintiff might treat the contract as at an end, and recover damages for the breach of the contact as a whole." We cannot say that this instruction was erroneous as applied to the facts in evidence in the cause, which are not set out.

The jury must have found that the plaintiff did treat the contract as finally broken by the defendant, and the propriety of this finding on the evidence is not before us.

Judgment on the verdict for the larger sum.

BALTIMORE AND POTOMAC RAILROAD *v.* FIFTH BAPTIST CHURCH.

United States Supreme Court, 1883. 108 U. S. 317.

Action in the nature of an action on the case to recover damages for the discomfort occasioned by the establishment of a building for housing the locomotive engines of a railroad company contiguous to a building used for Sunday-schools and public worship by a religious society.

The court gave a charge to the jury in part, as follows:

"We can imagine, and it is not a far-fetched imagination either, that the effect of such a workshop in that neighborhood might be to collect a population around it, and thus enhance the population in that neighborhood, and really enhance the value of property; and yet the congregation would be entitled to recover damages (although their property might have been increased in value) because of the inconvenience and discomfort they have suffered from the use of the shop. The congregation has the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort which is the primary consideration in allowing damages."

FIELD, J. * * * The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded. The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke, and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for

the estimate of damages. There is, however, an injury, the extent of which the jury may measure.

Judgment affirmed.

DARLEY MAIN COLLIERY CO. *v.* MITCHELL.

House of Lords, 1886. 11 App. Cas. 127.

Appeal from a decision of the Court of Appeal.

Lord Halsbury, L.C. My Lords, in this case the plaintiff, the owner of land upon the surface, has sued the lessee of certain seams of coal below and adjacent to the plaintiff's land for having disturbed the plaintiff in the enjoyment of his property by causing it to subside. The defendants before and up to the year 1868 have worked, that is to say, excavated, the seams of coal, of which they were lessees. Their excavation caused a subsidence of the ground, for which they acknowledged their liability and made satisfaction. There were other subsidences after this, and as the case originally came before your Lordships, it was a matter of inference only whether these subsidences were or were not in some way connected with, if not forming part of, the original subsidence. The parties have now, by an admission at your Lordships' bar, placed the matter beyond doubt.

It has been agreed that the owner of the adjoining land worked out his coal subsequently to 1868. That if he had not done so there would have been no further subsidence, and if the defendants' coal had not been taken out, or if sufficient support had been left, the working of the adjoining owner would have done no harm. Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and forever. A house that has received a shock may not at once show all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness

of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.

But the words "cause of action" are somewhat ambiguously used in reasoning upon this subject; what the plaintiff has a right to complain of in a Court of Law in this case is the damage to his land, and by the damage I mean the damage which had in fact occurred, and if this is all that a plaintiff can complain of, I do not see why he may not recover *toties quoties* fresh damage is inflicted.

Since the decision of this House in Bonomi v. Backhouse, 9 H. L. C. 503, it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation.

In Rowbotham v. Wilson, 8 E. & B. 123, 157, Cresswell, J., said that the owner of the mines might have removed every atom of the minerals without being liable to an action, if the soil above had not fallen; and what is true of the first subsidence seems to me to be necessarily true of every subsequent subsidence. The defendant has originally created a state of things which renders him responsible if damage accrues; if by the hypothesis the cause of action is the damage resulting from the defendant's act, or an omission to alter the state of things he has created, why may not a fresh action be brought? A man keeps a ferocious dog which bites his neighbor; can it be contended that when the bitten man brings his action he must assess damages for all possibility of future bites? A man stores water artificially, as in Fletcher v. Rylands, Law Rep. 3 H. L. 330; the water escapes and sweeps away the plaintiff's house; he rebuilds it, and the artificial reservoir continues to leak and sweeps it away again. Cannot the plaintiff recover for the second house, or must he have assessed in his first damages the possibility of any future invasion of water flowing from the same reservoir?

With respect to the authorities, the case of Nicklin v. Williams, 10, Ex. 259, was urged by the Attorney-General as an authority

upon the question now before your Lordships, by reason of some words attributed to Lord Westbury in Bonomi v. Backhouse. If Lord Westbury really did use the words attributed to him, it is, I think, open to doubt in what sense they are to be understood. Baron Parke in that case delivered the judgment against the plaintiffs recovering any subsequently accruing damage, because, he said, the cause of action was the original injury to the right by withdrawing support. That principle is admittedly wrong, and was expressly held to be wrong in Bonomi v. Backhouse, since if that had been law there could have been no answer to the plea of the Statute of Limitations in that case. It is difficult to follow the Master of the Rolls when he says it was not necessary to overrule Nicklin v. Williams by that decision. It seems to me to have been the whole point decided in Nicklin v. Williams, and how that case so decided can be an authority for anything I am at a loss to understand.

I think the decision of this case must depend as matter of logic upon the decision of your Lordships' House in Bonomi v. Backhouse, and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but if such considerations were permissible, I think Cockburn, C.J., in his judgment in Lamb v. Walker, 3 Q. B. D. 389, establishes the balance of convenience to be on the side of the law, as established by Bonomi v. Backhouse. I cannot logically distinguish between a first and a second, or a third, or more subsidences, and after Bonomi v. Backhouse it is impossible to say that it was wrong in any sense for the defendant to remove the coal. Cresswell, J., has said, and I think rightly, that he might remove every atom of the mineral.

The wrong consists, and, as it appears to me wholly consists, in causing another man damage, and I think he may recover for that damage as and when it occurs.

For these reasons, I think that the judgment appealed from should be affirmed with costs.

Lord Blackburn writes a dissenting opinion.

Order appealed from affirmed; and appeal dismissed with costs.

LEWIS *v.* HARTFORD DREDGING CO.

Connecticut, 1896. 68 Conn. 221.

BALDWIN, J. The contract in suit was one for services to be rendered in dredging material from the bed of the Housatonic river at a designated point, and spreading it over the plaintiff's oyster grounds at Westport, by a certain day in August, when the spawning season for oysters was expected to open. These grounds were of such a character that, for raising seed oysters upon them, it was necessary to spread some hard material over them, in order to intercept the floating spawn. This, in the phrase of the trade, is "planting" them, to "catch a set." The material which could be dredged up at the point agreed on was largely shells, and better adapted to use on these grounds than anything else. To do work of this description, a certain kind of dredging outfit is required, capable of dumping shells with facility. The defendant had such an outfit, but, instead of employing it in the execution of the contract, employed one Tebo to undertake it, with an inferior and unsuitable plant. Tebo, finding that his outfit was ill adapted to dumping shells, abandoned the work after a few days, and the superintendent of the defendant then informed the plaintiff that it was doubtful if any other dredging outfit could be obtained to perform the work, and that he "must protect himself by obtaining other material that might be available." Thereupon he bought crushed stone in New York, and had it spread upon part of his grounds, at an expense considerably greater than that to which he would have been subject had they been planted as the contract required. Such stone was the best material then available for planting purposes, and the only material in the market, so far as the plaintiff knew, which was adapted for use upon his grounds.

The superior court, in assessing the plaintiff's damages, properly allowed him this difference in cost. The breach of a contract to render services ordinarily entails a liability for nothing more than the difference between what it would cost to get the same services performed by another and the contract price. But in the case at bar no other could be found who was able to do the work. It could not be undertaken without a peculiar kind of outfit, which few possessed. The plaintiff only bought the crushed stone after the defendant had informed him that it was

doubtful if such an outfit could be anywhere procured, and that he must protect himself by procuring other material than that which the contract contemplated. While it was much more costly than the river material would have been, it was the only thing to be had which would answer the purpose, and this purpose was one of which the defendant had reasonable notice before the contract was executed. The point at which the material was to be dredged was so far determined that the defendant could easily have ascertained the character of the river bed, and the place of delivery was also fully described. The defendant had dredged for oyster growers before, and had done this for the plaintiff, among others, to enable him to plant his oyster grounds for catching a set. Soundings would readily have disclosed the character of the bottom on which the material obtained from the river was to be spread. The defendant had no right to assume that any kind of material which might be dredged up anywhere would be adapted for use upon these grounds, and the plaintiff was justified in refusing to accept its tender of the muddy deposit obtained from the Bridgeport bar. He was justified, also, in taking the defendant at its word, and protecting himself against the consequence of its default by procuring suitable material for his purposes elsewhere. That he acted reasonably in the purchases he made is conclusively established by the findings of the trial court; and the numerous exceptions taken by the defendant to its conclusions of fact from the evidence in this respect are not the subject of an appeal. Enfield v. Town of Ellington, 67 Conn. 459.

To show that the material dredged from the Bridgeport bar was unsuitable for use on a sticky bottom, and that crushed stone was suitable, and well adapted for catching a set, expert testimony was properly received. Only from those skilled in oyster culture could information on these points be expected.

The letter from the plaintiff of July 19th, while evidently written in an argumentative strain, was admissible to show that he gave the defendant prompt notice of his intention to set up the claims which are the basis of this suit, and to protect himself at its expense by the purchase of crushed stone.

But in the admission of evidence as to the difference in market value on August 12th between an acre of the plaintiff's oyster grounds, unplanted, and an acre planted in the manner provided by the contract, as well as in the award of damages including

such an estimated difference in value, there was error. By its failure to provide the proper material for planting part of these grounds, the defendant became liable to pay the plaintiff such damages as might have been reasonably contemplated, at the date of the contract, as the probable and direct result of its breach. The defendant knew that the material which it was to dredge and spread was wanted to form a bed for oyster culture, and to form it by the opening of the spawning season. These special circumstances were in the minds of both parties; but, if they could in any case avail to create a right to special damages, of the nature claimed, for a failure to prepare the grounds for oyster cultivation,—the sole use to which they could be put, —it would be only on proof, either that such grounds, when planted with suitable material, were permanently improved, or that such material generally catches a set, and that a set generally results in a valuable crop of seed oysters. On the contrary, however, it appeared that the results of planting were uncertain and conjectural in character, and the trial court states that the item of $2,280.13, included in its award of damages, which is now in question, was not based on any consideration of "future profits arising from the actual raising of oysters upon the unplanted area, or the enhanced value of the same from a 'set' attached to the material spread thereon, but is based upon a comparison of the market value of the planted and unplanted territory at the time fixed in the contract for its completion, and while the result of such planting was unknown." This difference in market value was fixed at $30 an acre, while the contract price for planting (for which a deduction was allowed in ascertaining the exact loss) averaged less than $14 an acre. No part of this enhanced value of over $16 an acre could be attributed to any hardening of the bottom, by which, although no set were obtained, the grounds would be permanently improved. This was explicitly admitted in the trial by counsel for the plaintiff; and, although that circumstance is not mentioned in the finding of the trial court, as the defendant specially requested that it be stated, and it appears in an extract from the official stenographic report of the proceedings, filed with the request, which is agreed by counsel for both parties to be a correct narrative of what occurred, we consider the finding as if it had been so drawn as to set forth the admission as made. It follows that the expert witnesses and the court must have viewed the in-

crease of value which would have followed the execution of the contract, as coming from the adaptation of the grounds to oyster culture during the spawning season then about to open. To allow for any enhancement of value on that account is, practically, to speculate on the chances of catching a set and raising a profitable crop. Such consequences were too remote for consideration, and too uncertain, both with respect to their nature and to the cause from which they would proceed. Cohn v. Norton, 57 Conn. 480, 494; Howard v. Manufacturing Co., 139 U. S. 199.

As respects the area necessarily left unplanted in consequence of the defendant's default, damages (in the absence of special circumstances calling for the application of a different rule) should have been limited to compensation for the loss of the use of the land until it again became practicable and proper to plant or otherwise improve it for oyster cultivation, in the usual course of the oyster growers' business. Such loss would, ordinarily, be the fair rental value of the grounds, or, if this could not be ascertained, the interest on their market value, in their unplanted condition, with the amount chargeable for taxes upon them, for the period in question. The finding states, however, that the plaintiff owned several thousand acres of oyster grounds, only a portion of which was under cultivation, and an extensive plant of shops, docks and oyster steamers. Of these grounds, 475 acres lay off Westport, of which only 100 had ever been planted. In the prosecution of the oyster business, "a certain area of oyster ground is planted each year, that successive crops may be matured and marketed or sold as seed oysters." If these special circumstances were, or ought to have been, known to the defendant before the execution of the contract in suit, and if the plaintiff could show that the failure to plant the whole of the Westport grounds so disarranged the ordinary and natural succession of his crops, or otherwise disturbed the ordinary and natural course of the business as respects the use of his other property, that he suffered special damages as a probable and direct result, which both parties ought, in reason, to have foreseen, a further recovery might be allowed, upon such an amendment of the complaint as to apprise the defendant of the nature of the loss actually sustained.

The plaintiff has alleged that he incurred expense in locating and staking out the place in the river where the dredging was

to be done, and securing a license from the government of the United States for dredging there, and hiring inspectors for the work, and for scows and harrows to complete the distribution of the material to be dredged over his grounds, and steamers chartered to aid in the same work, and that he should be reimbursed for such part of these payments as was properly made to secure the planting of the portion of his grounds which was in fact left unplanted. If such special circumstances existed, and were or should have been in the contemplation of the parties when the contract was executed, the plaintiff's claim in this respect, also, would be a proper one, so far as his expenditures were reasonably necessary for the purpose, subject to a deduction for any benefits which he may have otherwise received from them.

There is error in the award of the damages on account of the unplanted oyster grounds, and a new trial is granted for the sole purpose of reassessing the damages on that account, in accordance with the principles above stated. The other judges concurred.

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1) Elements of Compensation.

(1) *Loss of Time.*

LEEDS *v.* METROPOLITAN GAS-LIGHT CO.

New York, 1882. 90 N. Y. 26.

Finch, J. We think there was error in the mode of submitting to the jury the question of damages. Whether there was any evidence of negligence on the part of the defendant company upon which the verdict can rest, has been the principal controversy on the appeal, but need not be decided, since upon the new trial which must result the facts may be entirely different. If the evidence is insufficient now, it is possible that it may be made sufficient then.

The plaintiff was injured by an explosion of gas in the cellar or vault of the house occupied by him, and which had escaped from a break in the defendant's main. The character of his injuries was described by the evidence, and among other things it was proved that he was engaged in business at the time of

the injury, but had not been able to attend to business since. It was not shown what his business was, or the value of his time, or any facts as to his occupation from which that value could be estimated. The jury were left to guess or speculate upon this value without any basis for their judgment, so far as loss of time was an element of the damages awarded. The court charged that the plaintiff, if entitled to a verdict, was "entitled to recover compensation for the time lost in consequence of confinement to the house, or in consequence of his disability to labor from the injury sustained." The defendant's counsel excepted to this portion of the charge, assigning as a reason or ground of the exception, that there was no proof in the case of the value of such time. The answer made on behalf of the plaintiff is a criticism on the form of the exception. It is said that "as the defendant's counsel did not ask the court to instruct the jury that there was no evidence of the value of plaintiff's time, the only question here raised is whether the proposition charged is law." It was not necessary to make that request. The court had charged, in a case where no value of lost time had been shown, and no facts on which an estimate of such value could be founded, that compensation for such lost time could be awarded by the jury. The exception was aimed at that precise proposition, and the ground upon which it was claimed to be erroneous was definitely pointed out. The charge, therefore, can only be defended upon two grounds: either, that evidence of the value of the lost time was given, or, if not, that the jury were at liberty to guess at and speculate upon that value, and estimate it as they pleased. The first ground we have shown to be untenable, and the exception consequently requires us to determine the second. In very numerous actions for negligence, both those where death had resulted and which were prosecuted under the statute, and those for injuries not resulting in death, evidence showing the occupation or business of the injured party and tending to establish his earning power has been held competent and material. (Grant v. City of Brooklyn, 41 Barb. 384; Masterton v. Village of Mount Vernon, 58 N. Y. 391; Beisiegel v. N. Y. Central R. R. Co., 40 Id. 10.) And that is so because the element of damages which consists of lost time is purely a pecuniary loss or injury, and for such only fair and just compensation must be given, and the jury have no arbitrary dis-

cretion, but must be governed by the weight of evidence. (McIntyre v. N. Y. Central R. R. Co., 37 N. Y. 289.) The rule of recovery is compensation. Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. (Sedgwick on Damages, chap. 2, p. 47; Brantingham v. Fay, 1 Johns. Cas. 264; N. Y. Dry Dock Co. v. McIntosh, 5 Hill, 290.) In the present case the jury knew simply that time was lost by reason of incapacity to labor. They were bound to consider it of some value, but could not go beyond nominal damages, and give compensation for it upon an arbitrary standard of their own. This they were permitted to do. Without proof of the extent or character of the plaintiff's pecuniary loss, they were left to fix it as they pleased. Among the elements of damage in cases of injury for negligence, is the cost of the cure, the bills and expenses of medical attendance. Suppose that the bare fact was shown that the deceased had a doctor, but the length of his attendance was not given, the amount of his charges not shown, would it do to permit the jury to give compensation for the cost of the cure upon their own guess or speculation as to its amount? For pain and suffering, or injuries to the feelings, there can be no measure of compensation, save the arbitrary judgment of a jury. But that is a rule of necessity. Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent. If that is not done, the jury cannot indulge in an arbitrary estimate of their own.

The judgment should be reversed, a new trial granted, costs to abide the event.

LUND *v.* TYLER.

Iowa, 1901. 115 Iowa, 236.

Action to recover damages for assault and battery. Verdict and judgment for plaintiff. Defendant appeals.

McCLAIN, J. There was evidence tending to show that at the beginning of the fight which resulted in the injury to plaintiff, the plaintiff had challenged the defendant to combat, using insulting language in doing so; and the principal complaint of appellant is of the refusal of the trial court to instruct that if plaintiff, by his actions and words, invited the fight in which

he was injured, he cannot recover damages for such injuries. There seems to be some authority for such a proposition, and counsel have cited Galbraith v. Fleming, 60 Mich. 408; Smith v. Simon, 69 Mich. 481. But the weight of authority is that, where a combat involves a breach of the peace, the mutual consent of the parties thereto is to be regarded as unlawful, and as not depriving the injured party, or for that matter, each injured party, from recovering damages for injuries received from the unlawful acts of the other. Shay v. Thompson, 59 Wis. 540; Stout v. Wren, 8 N. C. 420; McCue v. Klein, 60 Tex. 168; State v. Burnham, 56 Vt. 445. This view of the law is stated without qualification in Cooley, Torts (2d Ed.) 187. Insulting conduct and language of the plaintiff towards the defendants might, no doubt, have been considered in mitigation of damages, if so pleaded; but that question was not presented in the town court.

Plaintiff, as a witness, testified that at the time of the injury he was engaged in fishing for a living, and that he lost two weeks' time in consequence of defendant's act. Appellant argues that plaintiff was improperly allowed to answer as to the reasonable worth of his time. Certainly plaintiff might recover for loss of earnings during the time. The business was one involving not speculative profits but mainly the personal efforts of the plaintiff, the profits in which could be considered as earnings, and therefore loss of time therein might be shown as resulting in loss of earnings. Kinney v. Crocker, 18 Wis. 74, 82. It seems to us that the question properly called for an answer as to what plaintiff's reasonable earnings during such time would have been. If defendant desired more specific information, he could have secured it by cross-examination.

Other objections to evidence seem to us not to raise any question on which a discussion of the law would be profitable.

Affirmed.

SMITH *v.* WHITTLESEY.

Connecticut, 1906. 79 Conn. 189.

Appeal from Court of Common pleas, Hartford County.

Action to recover damages for injury caused by negligence in driving an automobile on the public highway and for treble damages under Gen. St. 1902, §§ 2035, 2036. There was a judgment for plaintiff, and defendant appeals.

HAMERSLEY, J. In Parmelee v. Baldwin, 1 Conn. 317, Chief Justice Swift, speaking for the court, said: "In actions for torts, where the law necessarily implies that the plaintiff has sustained damage by the act complained of, it is not necessary to make an allegation of special damages in the declaration; but where the law does not necessarily imply such damage it is essential to the validity of the declaration that the resulting damages should be stated with particularity." We have uniformly enforced this technical rule of pleading as well since as before the adoption of the practice law. When the wrongful act complained of consists in inflicting a severe bodily injury, the consequent endurance of pain and loss of time are a necessary direct result of the injury inflicted, and constitute a damage which the law implies that the plaintiff has sustained by the act complained of. Such damage may be shown under the general allegation of damage, and need not be specially stated. Bristol Mfg. Co. v. Gridley, 28 Conn. 201, 212. Inability to follow one's ordinary avocations, consequent upon an injury inflicted, may be proved to characterize the extent of such injury; but when damage is claimed for special consequences which must depend on the peculiar circumstances of the plaintiff at the time of and previous to the injury, as that he was actually engaged in some special business yielding a pecuniary profit, such special consequences are a special damage which must be stated with particularity. The averment that the plaintiff was prevented from attending to his ordinary business serves to characterize the injury and its extent and permanence in a general way, but does not lay the foundation for proof of special damages. Tomlinson v. Derby, 43 Conn. 562, 567; Taylor v. Monroe, 43 Conn. 36, 46, affirmed in Eldridge v. Gorman, 77 Conn. 699.

The complainant before us alleges no special damage involved in a loss of time by reason of the peculiar circumstances of the plaintiff, and alleges no loss of time except as it may be implied in the statement of the injury inflicted. The court might properly have instructed the jury that, in determining the reasonable damage necessarily resulting from the injury inflicted, they might take into consideration the loss of time and pain and suffering, mental and physical, actually proved as tending to show the nature and extent of the injury and enhance the damage actually suffered. But we cannot find any satisfactory reason for treating as the substantial equivalent of this the instruc-

tion the court did give. It appears from the finding that there was evidence tending to show that the plaintiff lost some time on account of his injuries, but that there was substantially no evidence of the money value of the time lost. This state of the evidence might have justified the court in telling the jury that the loss of time proved might be considered in determining the extent of the injury and the amount of damage necessarily suffered therefrom, but did not justify the court in assuming that special damages were properly claimed and in instructing the jury as it did in respect to assessing such damages. The court in substance told the jury that, in addition to the damage implied by law from the infliction of an injury of the extent proved, they should assess as damages the pecuniary loss to the plaintiff by reason of the loss of time proved and in the absence of any evidence of the value of his time to the plaintiff and of the exact data from which they could compute the amount of damage to him for that loss, they must assess the damage on this account, if damages have been proved, at such reasonable sum as would fairly compensate the plaintiff for his loss on account of time lost. We think that, in view of the state of the pleadings and evidence and claims, this instruction was erroneous, and that it was calculated to induce the jury to believe they were authorized to ascertain the money value of the time lost by the plaintiff to him, and to assess as special damage that pecuniary loss, and, in the absence of any proof of value or of exact data for computing the amount lost, they were bound to conjecture some reasonable amount which, in their judgment, would fairly compensate the plaintiff. An ascertainment of the amount of general damages, or damages implied by law as the necessary results of a bodily injury wrongfully inflicted, is *ex necessitate rei* largely controlled by conjecture. But, in ascertaining the amount of a pecuniary loss not necessarily a result of the injury but dependent for its existence and amount upon facts and circumstances requiring appropriate evidence, the jury must be governed by such evidence, and, in its absence, are not permitted to resort to mere conjecture. Gold v. Ives, 29 Conn. 119, 124.

* * *

The only error apparent in the record or claimed upon appeal is one affecting the assessment of damages. Other material issues submitted to the jury have been found for the plaintiff, to wit: that while plaintiff and defendant were traveling the same

course on the public highway, the defendant carelessly drove his vehicle against that of the plaintiff and hurled the plaintiff against the wheel of his vehicle, whereby the plaintiff was severely injured; that the plaintiff, as well as the defendant, at the time of the injury, was traveling in a vehicle for the conveyance of persons as described in sections 2035, 2036, Gen. St. 1902. These issues have been legally settled, and the error of the court in respect to damages may be fully corrected without a retrial of these issues. In such a case it is plain that the issues rightly settled ought not to be reopened, and this court has the power to qualify its order for a new trial by limiting the retrial to that part of the case in which alone there is any error. Davenport v. Bradley, 4 Conn. 309. * * * We think the present case calls for the application of this principle, and that the new trial should be limited to the assessment by a jury of the damage alleged in the complaint.

There is error, and a new trial is ordered limited to the assessment of damages. In this opinion the other judges concurred.

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(2) *Earning Power.*

JOHNSTON *v.* GREAT WESTERN RAILWAY COMPANY.

L. R. 2 K. B. 1904, 250.

The action was brought to recover damages for personal injuries. The only question was as to the amount of damages.

The muscles of the plaintiff's left thigh were seriously injured, and he was under medical treatment for some months. After he was able to walk about again his left knee was very liable to give way, and on several occasions he fell in consequence of this.

The action was tried by Grantham J. with a jury. The medical evidence showed that the plaintiff's leg would probably never be in the same condition as before the accident; that, if he would undergo an operation (which he was willing to do), the state of the leg would in all probability be much improved; that there was necessarily some, though but small, risk, attending the operation; and that if it was successful he would still have to be very careful, especially in going up or down a ladder or in moving about among machinery.

The plaintiff had been trained as an engineer, and had passed examinations with great distinction, and had obtained a first-

class certificate. His intention was to obtain, if possible, the appointment of a superintending marine engineer. He had good prospects of obtaining such an appointment, because his uncles were the owners of a line of steamships, called the Johnston Line. At the time of the accident the plaintiff was residing with his father, and was employed by him at a salary of 3 l. a week on some engineering business, in connection with which he was travelling when the accident happened.

Verdict for 3000 l. and defendants apply for a new trial.

VAUGHAN-WILLIAM L. J. * * * If the Court, from the circumstances of the case and the amount of the damages, can draw the inference that the jury must have applied a wrong measure of damage in contravention of the direction of the judge, the Court may order a new trial, although it is not in a position to say that the mere quantum of excess is so large that no reasonable jury could have arrived at such an amount. I would refer to the following passage in the judgment of Cockburn L. C. J., 4 Q. B. D. at p. 407; "But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict. But looking to the figures in the present case, it seems to us that the jury must have omitted to take into account some of the heads of damage which were properly involved in the plaintiff's claim." So in the present case, if I could come to the conclusion that, looking at the figures, the jury must have taken into account some head or some measure of damage not properly involved in or applied to the plaintiff's claim, I should say that we ought to order a new trial. The Court of Appeal affirmed the judgment of Cock-

burn L. C. J., and James L. J. said, 5 Q. B. D. at p. 85: "We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less, still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a Court of first instance, and if necessary of a Court of Appeal, in this way, that is to say, if in the judgment of the Court the damages are unreasonably large or unreasonably small, then the Court is bound to send the matter for reconsideration by another jury." It seems to me that there is nothing in these words of James L. J. inconsistent with Lord Esher's rule in Praed v. Graham, 24 Q. B. D. 53. The Lord Justice continued: "The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the damages are unreasonably small, to what extent, of course, we must not speculate, and have no business to say."

Now, in my opinion, the only way in which the figure of the damages and the circumstances of the present case could prove that the jury in measuring the damages took into consideration topics which they ought not to have taken into consideration, or applied a measure of damage which they ought not to have applied, would be, if we could draw the inference that the amount of the verdict proved that the jury had disregarded the fact to which their attention was called by Grantham J., that the accidents of life and other elements ought to be taken into consideration so as to prevent a jury from giving a plaintiff such a sum as would be simply an investment, enabling him to do nothing to earn his livelihood. Now one could only come to such a conclusion if it could properly be said that no jury, having regard to the evidence, could have put the difference between the prospective earnings of the plaintiff if he had been uninjured and those earnings after his injury at a higher figure than, say, Lx a year, and then if you found that the amount of the verdict, after deducting all special damage and all damages given for personal pain and suffering, was a sum which equalled or

exceeded the sum which would purchase a life annuity for a person of the plaintiff's age equal to the difference to which I have referred. In such a case I think a new trial might be ordered without reference to any perversity of mind of the jury in regard to the quantum. In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial. But I am not prepared to say that that is so in the present case.

It is, no doubt, very difficult in the present case to estimate the damages, but I think that, taking the evidence as a whole, it is not unreasonable to say that the jury were entitled to take into consideration as a material and substantial matter the possibility that the plaintiff would never be able to accept the position of a superintending marine engineer. It is obvious that he was intended for that; at the time of the accident that was the intention of his life. He was just putting a finishing touch to his education, not in respect of the special matter of marine engineering, but in respect of the general knowledge which every engineer ought to have, and he was doing this because, having regard to the interest of his family in shipping, it was reasonably certain that as soon as he was qualified he would obtain such a post; and that he was qualified, and highly qualified, there can be no doubt.

What, then, ought we to do if there is evidence which would justify a jury in coming to a conclusion that it was extremely doubtful whether the plaintiff ever would be able to fill such post? Apparently from the evidence the position of a superintending marine engineer is a well-paid position, some such engineers getting as high a salary as 1500 l. a year, and many getting from 700 l. to 1000 l. Under these circumstances it is extremely difficult to form any positive opinion as to the amount of the difference in the plaintiff's prospective earnings—the difference between what he would have got if there had been no accident and what he would be able to get since the accident; and I do not see my way, by reason of the amount of the damages or of the evidence, to say that the jury have taken into consideration either topics or a measure of damages which they ought not to have taken into consideration. * * *

STIRLING, L. J. I am of the same opinion, and I have really

very little to add; but, out of respect to the argument which has been addressed to us, I wish to state very shortly the grounds on which I have arrived at my conclusion. The question is as to the amount of damages to which the plaintiff is entitled by reason of a railway accident. The plaintiff is a young man of twenty-eight, who has been trained for the position of a superintending marine engineer. He has trained himself for that, not merely because engineering is a profession to which he desires to apply himself, but because he had the prospect through his relatives of filling such a post. At the time of the accident he had not obtained that position. He was then only in the employment of his father's firm temporarily, at salary of 3 l. a week, and living at home. Then occurred this accident, and after it he made an attempt to obtain employment in connection with some steamers abroad; his application was refused on the ground of his physical condition. The salary attached to that appointment would have been over 500 l. a year, rising annually. There is ample evidence that he was well qualified to fill that position. That is how matters stood at the time of the trial. But it was said that he might submit to an operation which, if successful, would greatly improve his condition, and he was willing to submit to it. Of course, there is always a certain amount of risk attending any operation, but in the present state of surgical skill, as I read the evidence, the danger in this case would not be great. But what would be the position supposing that the operation was successful? Dr. Pepper, the plaintiff's principal medical witness, said: "Impossible for him ever to be as good as before the accident" (that is, even if the operation was successful). "I do not think he can or ought to take any place requiring him to go up and down ladders." Now that being the general outline of the case, for I think there is no great difference in the medical opinions, the question is whether the jury have come to a conclusion which we can call in question by reason of their having given a verdict for 3000 l. Of that sum about 450 l. is in respect of expenses and loss of income, which at the date of the trial had been already incurred. There remains, therefore, a sum of 2550 l., which is the compensation for the prospective loss to this young man in his profession. Looking at all the circumstances, and weighing them, I am unable to come to the conclusion that the jury have either taken into consideration matters which they ought not to have taken into

consideration or that the sum is one which twelve sensible men could not reasonably have awarded. In these circumstances, although I do not think I should myself have come to the same conclusion as to the amount of damages, I do not see my way to interfere with the verdict and judgment.

Application refused.

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(3) *Loss of Wages.*

WALKER *v.* CITY OF PHILADELPHIA.

Pennsylvania, 1900. 195 Pa. 168.

Action to recover for personal injuries to wife of plaintiff.

MITCHELL, J. * * * There was also error on the subject of damages, in permitting plaintiff's daughter to testify to what she was earning in her employment as a dressmaker, which she gave up to wait on her mother after the injury. Conceding (though the sufficiency of the evidence is questionable) that plaintiff had proved an express contract to pay his daughter for services which, as a member of the family, were *prima facie* presumed to be rendered gratuitously (Goodhart v. Railroad Co., 177 Pa. St. 1), yet the measure of compensation for which the city could be held liable was the ordinary wages of such attendance. What the daughter had earned or could earn at her independent trade was wholly irrelevant and misleading.

CAMPARETTI *v.* UNION RY. CO.

New York, 1904. 95 App. Div. 66.

HIRSCHBERG, P. J. This appeal presents but one question for review, viz., the accuracy of the charge of the court to the effect that the jury might award to the plaintiff whatever sum they saw fit to allow him for loss of earnings during the time he was absent from his work because of the personal injuries complained of. He was injured while a passenger on one of the defendant's cars, on December 8, 1903, and he alleged in his complaint that by reason of such injury he was "entirely incapacitated from attending to any business whatsoever for a period of several weeks." A bill of particulars was afterwards filed by him, stating the nature of his injuries, and a further bill was also filed in reference to his loss of earnings, stating that "plaintiff is a stone and brick mason, and earns $4 a day. He was totally in-

capacitated for a period of about three weeks and a half after the accident, being confined to his room."

No evidence was given on the trial of the amount of the plaintiff's wages or earnings. There was proof that his doctor's bill amounted to $20. The court charged the jury as follows:

"The maximum that you may find, if you do find for the plaintiff, will be $249, made up in his claim and bill of particulars, of three weeks and a half at $4 a day as stone mason, and $20 which the doctor says he has charged for services for something like 12 or 13 visits. The balance would represent the suffering as much as you say you think he was entitled to under the circumstances, provided you find for the plaintiff."

The defendant excepted to the charge as to the $4 a day, whereupon the court charged that:

"In reference to earning $4 a day that he was detained from his work, I think he testified, as a stone mason, 22 days, and, the amount of the salary not being stated, you may allow him what you think is right and fair, and an honest compensation to him for being kept from his work."

Exception was taken to this, and the court then said:

"I will not charge that if the attorney for the defendant objects, inasmuch as there seems to be a difference of opinion whether or not there was any testimony given as to how much the plaintiff earned at his trade. I will leave that matter to the jury. You may allow him such sum as you see fit, from the testimony that you have heard, to compensate him for the 22 days away from his work, and a balance of $20 for doctor's fees, and as much as you see fit for his suffering."

This was also excepted to, the defendant insisting that only a nominal allowance could be made for loss of earnings. The verdict of the jury was for $249, the maximum amount stated by the court, including an allowance of $4 per day for the loss of wages. There could be no recovery, however, for this item beyond a nominal sum, in the absence of proof of the amount of the loss. Leeds v. Metropolitan Gas Light Co., 90 N. Y. 26; Staal v. The Grand Street & Newtown R. R. Co., 107 N. Y. 625; Baker v. M. R. R. Co., 118 N. Y. 537; Metz v. Metropolitan St. R. R. Co., 82 App. Div. 168.

The judgment should be reversed.

Judgment of the municipal court reversed, and new trial ordered; costs to abide the event. All concur.

WYMAN *v.* DEADY.

Connecticut, 1906. 79 Conn. 414.

Action to recover damages caused by the act of the defendants in procuring the plaintiff, by threats and intimidation, to be discharged by his employers. Verdict for the plaintiff. Defendants' motion to set aside the verdict denied by the court. Appeal by defendants.

HALL, J. The amended complaint in this action contains substantially these allegations: The plaintiff is a painter, decorator, and wood finisher, and, as such, has been in the employ of David R. and Frank M. Hawley, who are painters and contractors. The defendant, the Painters, Decorators & Paper Hangers of America, Local Union No. 481, a voluntary association located in Hartford, is a trade union whose proceedings are secret, and which is organized for the purpose of maintaining high rates of wages, reducing the hours of labor, preventing the employment of non-union men, and similar purposes. The defendant Deady is a member of said association, and its business agent or walking delegate.

On or before the 25th of October, 1905, the defendants "maliciously and unlawfully conspired, combined, and confederated with each other, and with other persons to the plaintiff unknown, to injure the plaintiff, and to prevent him from working at his trade, and from obtaining employment," and on said day, "in pursuance of said conspiracy, willfully, and maliciously, and by means of threats and intimidations, induced the said David R. and Frank M. Hawley to discharge the plaintiff from their employ" and "because of the threats and intimidations of the defendants" the said Hawleys, on said day, discharged the plaintiff from their employ. At that time the plaintiff was receiving wages at the rate of $3 per day. Since his discharge he has been unable to obtain steady employment, and has thereby lost a large sum of money, which he would otherwise have earned, and "has been greatly injured in his business, and has been greatly damaged by the unlawful action of the defendants." The complaint is dated November 16, 1905, and claims $1,500 damages. The answer in effect denies the above-stated allegations of the complaint. The jury rendered a verdict for the plaintiff for $425 damages. The defendants filed a motion to set aside the verdict and for a new trial, upon the ground that it was against the

evidence, and that the damages awarded were excessive, which motion was denied by the trial court. The denial of said motion is the only error assigned in the appeal. The decision of the trial judge should be sustained if it appears from the printed record before us that there was some evidence upon which the jury could reasonably have found the issues submitted to them in favor of the plaintiff, and could properly have awarded him damages to the amount named in the verdict. Birdseye's Appeal, 77 Conn. 623-625.

The defendants contend that the record contains no evidence of the alleged conspiracy, nor of the alleged malice, at least, upon the part of the union, nor of any authority of Deady from the union to make the claimed threats; and that as it appears from the plaintiff's own testimony that he was unemployed but 86 days during the period between the day of his discharge, and the date of the commencement of this action, and could have earned but $3 a day, the damages recoverable could not have exceeded $258. Section 1296 of the General Statutes of 1902 makes it a criminal offense to threaten or use any means to intimidate any person to compel him to do or abstain from doing against his will any act which such person has a right to do. To deprive a workman of his employment by threatening and intimidating his employer is a criminal offense under this statute. State v. Glidden, 55 Conn. 46-74. That one who, by such means, has so injured an employe would also be liable in damages in a civil action is not questioned in this action. When such an injury results from the execution of a conspiracy it is the wrongful act done in carrying out the concerted plan, and not the conspiracy itself which furnishes the real ground for a civil action. Savill v. Roberts, 1 Ld. Raymond, 374. Hutchins v. Hutchins, 7 Hill (N. Y.) 107.

The gist, therefore, of the present action is not the alleged conspiracy, but the injury to the plaintiff caused by the unlawful acts of the defendants in procuring his dismissal by threatening and intimidating his employers. Bulkley v. Storer, 2 Day, 531. To entitle the plaintiff to a verdict against both defendants no further proof of a conspiracy was required than that they were joint tort-feasors in procuring the dismissal of the plaintiff by means of such threats and intimidation; and had the proof been that but one of the defendants so procured the discharge the

plaintiff, under section 760 of the General Statutes of 1902, would have been entitled to a verdict against that one.

Neither was it necessary for the plaintiff, to entitle him to a verdict under the allegations of the complaint, to prove any other malice than that which the law might imply from the unlawful act proved. The allegations of conspiracy and of malice contained in the complaint were neither of them essential to a sufficient statement of the plaintiff's cause of action. The former may be regarded either as an averment of a fact, the proof of which might aid the plaintiff in establishing a joint liability of the defendants, or like the averment of malice, as an allegation of a fact in aggravation of the injury complained of. Robertson v. Parks, 76 Md. 118. Garing v. Frazer, 76 Me. 37.

Upon the question of whether the procurement of the plaintiff's discharge by the means alleged, was the joint act of the defendants, the testimony of the plaintiff, of his said employers, of the defendant Deady, and of other officers and members of the union, and the records of the doings at various meetings of the union were presented in the trial court. It is not our purpose to repeat that evidence here. It is sufficient for us to say of it that the record shows that there was evidence before the jury from which, in our opinion, they might reasonably have concluded that the plaintiff was discharged from his employment on account of the threats to his employers, and the means to intimidate them made and used by the defendant Deady for the purpose of compelling the plaintiff's discharge; that Deady was the business agent and so-called walking delegate of the defendant union, and did said acts not only with the knowledge and approval, but by the authority of the union. Such facts would render both defendants liable as joint tort-feasors. The damages awarded are not necessarily excessive. Punitive damages might have been awarded even against the union if it either directed Deady to do the particular acts complained of, or if it afterwards approved them (Maisenbacker v. Society Concordia, 71 Conn. 369-379), or the jury may have found, as alleged in the complaint, that the plaintiff was otherwise injured in his business, than by the loss of employment during said period.

There is no error.

The other Judges concurred.

(4) *Loss of Profits.*

MASTERTON *v.* THE MAYOR OF BROOKLYN.

New York, 1845. 7 Hill, 62.

The plaintiffs agreed to furnish and deliver marble from the quarry of Kain and Morgan for building the City Hall in Brooklyn. The amount required was 88819 feet, for which they were to be paid a specified price. Plaintiffs then contracted with the owners of the quarry for the marble. When the plaintiffs had delivered 14779 feet and had on hand at the quarry 3308 feet ready for delivery, the City of Brooklyn stopped the work and obliged the plaintiffs to break their contract with Kain and Morgan, without any fault on the part of the plaintiffs. Plaintiffs sought to recover the profits of the contract and also the damages to which they were subjected through the violation of the subcontract for the marble at the quarry.

NELSON, C. J. The damages for the marble on hand, ready to be delivered, was not a matter in dispute on the argument. The true measure of allowance in respect to that item was conceded to be the difference between the contract price, and the market value of the article at the place of delivery. This loss the plaintiffs had actually sustained, regard being had to their rights as acquired under the contract.

The contest arises out of the claim for damages in respect to the remainder of the marble which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so.

The plaintiffs insist that the gains they would have realized, over and above all expenses, in case they had been allowed to perform the contract, enter into and properly constitute a part of the loss and damage occasioned by the breach; and they were accordingly permitted, in the course of the trial, to give evidence tending to show what amount of gains they would have realized if the contract had been carried into execution.

On the other hand, the defendants say that this claim ex-

ceeds the measure of damages allowed by the common law for the breach of an executory contract. They insist that it is simply a claim for the profits anticipated from a supposed good bargain, and that these are too uncertain, speculative, and remote to form the basis of a recovery.

It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets and the chances of business, to enter into a safe or reasonable estimate of damages. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So a good bargain made by a vendor, in anticipation of the price of the article sold, or an advantageous contract of resale made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded as too remote and contingent to affect the question of damages. Clare v. Maynard, 6 Adol. & Ellis, 519, and Cox v. Walker, in the note to that case; Walker v. Moor, 10 Barn. & Cress, 416; Cary v. Gruman, 4 Hill, 627, 628; Chitty on Contracts, 458, 870.

The civil law is in accordance with this rule. "In general," says Pothier, "the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs; the debtor is therefore not answerable for these; but only for such as are suffered with respect to the thing which is the object of the obligation, *damni et interesse ipsam rem non habitam.*" 1 Evans' Poth. 91; and see Dom. B. 3, tit. 5, § 2, art. 3, 4, 5, 6.

When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and doubtless often does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtile to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often perhaps attributable to the indiscretion and fault of the party himself, as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were embarrassed, than if it had been made with one in prosperous or affluent circumstances. Dom. B. 3, tit. 5, § 2, art. 4.

But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement. The parties may indeed have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must therefore abide the hazard.

Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages. To separate it from the general loss would seem to be doing violence to the intention and understanding of the parties, and severing the contract itself.

The civil-law writers plainly include the loss of profits, in cases like the present, within the damages to which the complaining party is entitled. They hold that he is to be indemnified for "the loss which the non-performance of the obligation has occasioned him, and for the gain of which it has deprived him." 1 Evans' Poth. 90; Dom. B. 3, tit. 5, § 2, art. 6, 12. And upon looking into the common-law authorities bearing upon the question, especially the later ones, they will be found to come nearly if not quite up to the rule of the civil law.

In Boorman v. Nash, 9 Barn. & Cress. 145, it appeared that the defendant contracted in November for a quantity of oil, one half to be delivered to him in February following, and the rest in March; but he refused to receive any part of it. And the court held that the plaintiff was entitled to the difference between the contract price, and that which might have been obtained in market on the days when the contract ought to have been completed. See M'Lean v. Dunn, 4 Bing. 722. The case of Leigh v. Paterson, 8 Taunt. 540, was one in which the vendor was sued for not delivering goods on the 31st of December, according to his contract. It appeared that, in the month of October preceding, he had apprised the vendee that the goods would not be delivered, at which time the market value was considerably less than on the 31st of December. The court held that the vendee had a right to regard the contract as subsisting until the 31st of December, if he chose, and recover the difference between the contract price, and the market value on that day. See also Gainsford v. Carroll, 2 Barn. & Cress. 624.

The above are cases, it will be seen, in which the profits of a good bargain were regarded as a legitimate item of damages, and constituted almost the only ground of recovery. And it appears to me that we have only to apply the principle of these cases to the one in hand, in order to determine the measure of damages which must govern it. The contract here is for the delivery of marble, wrought in a particular manner, so as to be fitted for use in the erection of a certain building. The plaintiff's claim is substantially one for not accepting goods bargained and sold; as much so as if the subject matter of the contract had been bricks, rough stone, or any other article of commerce used in the process of building. The only difficulty or embarrassment in applying the general rule grows out of the

fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but only the mode of ascertaining the actual value of the article, or rather the cost to the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it, becomes necessary; and that, compared with the contract price, will afford the measure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract, at the place of delivery. If the cost equals or exceeds the contract price, the recovery will of course be nominal; but if the contract price exceeds the cost, the difference will constitute the measure of damages.

It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years—of which about one year and a half only had expired at the time of the suspension—the benefits which the party might have realized from the execution of the contract, must necessarily be speculative and conjectural; the court and jury having no certain *data* upon which to make the estimate. If it were necessary to make the estimate upon any such basis, the argument would be decisive of the present claim. But in my judgment no such necessity exists. Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day.

It will be seen that we have laid altogether out of view the subcontract of Kain & Morgan, and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfilment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject matter of consideration at

all, in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the sub-contracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these sub-contracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants. The idea of assuming that the plaintiffs were necessarily compelled to break all their sub-contracts, as a consequence of the breach of the principal one, and that the damages to which they may thus be subjected ought to enter into the estimate of the amount recoverable against the defendants is too hypothetical and remote to lead to any safe or equitable result. And yet, the fact that these sub-contracts must ordinarily be entered into preparatory to the fulfilment of the principal one, shows the injustice of restricting the damages in cases like the present, to compensation for the work actually done, and the item of materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in fault.

If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the court and jury should see that in estimating this amount, it be made upon a substantial basis, and not left to rest upon the loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bar-

gain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital.

These views, it will be seen, when contrasted with the law as expounded and applied by the Circuit Judge, necessarily lead to the granting of a new trial.

BEARDSLEY, J. The Circuit Judge clearly erred in that part of his charge to the jury which related to the contract of the plaintiffs with Kain & Morgan. No damages are allowable on account of this contract, nor am I able to see how it can be regarded as relevant evidence upon any disputed point connected with the amount for which the defendants are liable.

The main question in the case arises out of the claim of the plaintiffs in respect to that portion of their contract with the defendants which remained wholly unexecuted in July, 1837. I think the plaintiffs are entitled to recover the amount they would have realized as profits, had they been allowed fully to execute their contract. The defendants are not to gain by their wrongful act, nor is that to deprive the plaintiffs of the advantages they had secured by the contract, and which would have resulted to them from its performance. The jury must therefore ascertain what it would probably have cost them to complete the contract, over and above the materials on hand; including the value of the marble required, the labor of quarrying and preparing it for use, the expense of transportation, superintendence, and insurance against all hazards, together with every other expense incident to the fulfilment of the undertaking. The aggregate of these expenditures is to be deducted from the amount which would be payable for the performance of this part of the contract, according to the prices therein stipulated, and the balance will be the damages which the jury should allow for the item under consideration.

Remote and contingent damages, depending on the result of successive schemes or investments, are never allowed for the violation of any contract. But profits to be earned and made by the faithful execution of a fair contract are not of this description. A right to damages equivalent to such profits

results directly and immediately from the act of the party who prevents the contract from being performed.

Where a vendor has agreed to sell and deliver personal property at a particular day, and fails to perform his contract, the vendee may recover in damages the difference between the contract price, and the market value of the property at the time when it should have been delivered. Chit. on Contracts, 445, 5th Am. ed.; Dey v. Dox, 9 Wend. 129; Gainsford v. Carroll, 2 Barns. & Cress. 624; Shepperd v. Hampton, 3 Wheat. 200; Quarles v. George, 20 Pick. 400; Shaw v. Nudd, 8 Id. 9; 2 Phill. Ev. 104. So, if a person who has agreed to purchase goods at a certain price refuses to receive them, he must pay the difference between their market value and the enhanced price which he contracted to pay. 2 Stark. Ev. 1201, 7th Am. ed.; Boorman v. Nash, 9 Barn. & Cress. 145.

These principles are strictly applicable to the present case. In reason and justice there can be no difference between the damages which should be recovered for the breach of an ordinary agreement to buy or sell goods, and one to procure building materials, fit them for use, and deliver them in a finished state, at a stipulated price. In neither case should the wrongdoer be allowed to profit by his wrongful act. The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law. Shannon v. Comstock, 21 Wend. 461; Miller v. Mariner's Church, 7 Greenl. 51; Shaw v. Nudd, 8 Pick. 13; Swift v. Barnes, 16 Id. 196; Royalton v. The Royalton & Woodstock Turnpike Co., 14 Verm. Rep. 311.

The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform and give them a right to recover full damages as for a total breach. I am not prepared to say that the plaintiffs might not have brought successive suits on this covenant, had they from time to time made repeated offers to perform on their part, which were refused by the defendants; but this the plaintiffs were not bound to do.

There can be no serious difficulty in assessing damages according to the principles which have been stated. The contract was made in 1836; and, according to the testimony, about five years would have been a reasonable time for its execution. That time has gone by. The expense of executing the contract must necessarily depend upon the prices of labor and materials. If prices fluctuated during the period in question, that may be shown by testimony. In this respect there is no need of resorting to conjecture; for all the *data* necessary to form a correct estimate of the entire expense of executing the contract, can now be furnished by witnesses.

If the cause had been brought to trial before the time for completing the contract expired, it would have been impracticable to make an accurate assessment of the damages. This is no reason, however, why the injured party should not have his damages; although the difficulty in making a just assessment in such a case has been deemed a sufficient ground for decreeing specific performance. Adderly v. Dixon, 1 Sim. & Stu. 607, and the cases there cited. In Royalton v. The Royalton & Woodstock Turnpike Co., 14 Verm. R. 311, 324, an action was brought on a contract which had about twelve years to run. And the court held, in granting a new trial, that the rule of damages "should have been to give the plaintiffs the difference between what they were to pay the defendants, and the probable expense of performing the contract; and thus assess the entire damages for the remaining twelve years." No rule which will be absolutely certain to do justice between the parties can be laid down for such a case. Some time must be taken arbitrarily at which prices are to be ascertained and estimated; and the day of the breach of the contract, or of the commencement of the suit, should perhaps be adopted under such circumstances. But we need not, in the present case, express any opinion on that point. No conjectural estimate is required to ascertain what would have been the expense of a complete execution of this contract; but the state of the market, in respect to prices, is now susceptible of explicit and intelligible proof. And where that is so, it seems to me unsuitable to adopt an arbitrary period; especially as the estimate of damages must in any event be somewhat conjectural.

I think the defendants are entitled to a new trial, and that the damages should be assessed upon the principles stated.

BRONSON, J. As the marble had no market value, the question of profits involves an inquiry into the cost of the rough material in the quarry, and the expense of raising, dressing, and transporting it to the place of delivery. There may have been fluctuations in the prices of labor and materials between the day of the breach and the time when the contract was to have been fully performed; and this makes the question upon which my brethren are not agreed. I concur in opinion with the Chief Justice, that such fluctuations in prices should not be taken into the account in ascertaining the amount of damages, but that the court and jury should be governed entirely by the state of things which existed at the time the contract was broken. This is the most plain and simple rule: it will best preserve the analogies of the law; and will be as likely as any other to do substantial justice to both parties.

New trial granted.

GRIFFIN *v.* COLVER.

New York, 1858. 16 N. Y. 489.

SELDEN, J. The only point made by the appellants is, that in estimating their damages on account of the plaintiff's failure to furnish the engine by the time specified in the contract, they should have been allowed what the proof showed they might have earned by the use of such engine, together with their other machinery, during the time lost by the delay. This claim was objected to, and rejected upon the trial as coming within the rule which precludes the allowance of profits, by way of damages, for the breach of an executory contract.

To determine whether this rule was correctly applied by the referee, it is necessary to recur to the reason upon which it is founded. It is not a primary rule, but is a mere deduction from that more general and fundamental rule which requires that the damages claimed should in all cases be shown, by clear and satisfactory evidence, to have been actually sustained. It is a well established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such cases, and not because there is anything in their nature which should *per se* prevent their allowance. Profits which

would certainly have been realized but for the defendant's default are recoverable; those which are speculative or contingent are not.

Hence, in an action for the breach of a contract to transport goods, the difference between the price, at the point where the goods are and that to which they were to be transported, is taken as the measure of damages; and in an action against a vendor for not delivering the chattels sold, the vendee is allowed the market price upon the day fixed for the delivery. Although this, in both cases, amounts to an allowance of profits, yet, as those profits do not depend upon any contingency, their recovery is permitted. It is regarded as certain that the goods would have been worth the established market price, at the place and on the day when and where they should have been delivered.

On the other hand, in cases of illegal capture, or of the insurance of goods lost at sea, there can be no recovery for the probable loss of profits at the port of destination. The principal reason for the difference between these cases and that of the failure to transport goods upon land is, that in the latter case the time when the goods should have been delivered, and consequently that when the market price is to be taken, can be ascertained with reasonable certainty; while in the former the fluctuation of the markets and the contingencies affecting the length of the voyage render every calculation of profits speculative and unsafe.

There is also an additional reason, viz., the difficulty of obtaining reliable evidence as to the state of the markets in foreign ports; that these are the true reasons is shown by the language of Mr. Justice Story, in the case of the Schooner Lively, 1 Gallis. 315, which was a case of illegal capture. He says: "Independent, however, of all authority, I am satisfied upon principle that an allowance of damages, upon the basis of a calculation of profits, is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness in point of time and value which would sometimes present embarrassing obstacles. Much would depend upon the length of the voyage and the season of the arrival; much upon the vigilance and activity of the master,

and much upon the momentary demand. After all, it would be a calculation upon conjectures and not upon facts."

Similar language is used in the cases of the Amiable Nancy, 3 Wheat. 546, and L'Amistad de Rues, 5 Wheat. 385. Indeed, it is clear that whenever profits are rejected as an item of damages, it is because they are subject to too many contingencies, and are too dependent upon the fluctuations of markets and the chances of business, to constitute a safe criterion for an estimate of damages. This is to be inferred from the cases in our own courts. The decision in the case of Blanchard v. Ely, 21 Wend. 342, must have proceeded upon this ground, and can, as I apprehend, be supported upon no other. It is true that Judge Cowen, in giving his opinion, quotes from Pothier the following rule of the civil law, viz.: "In general, the parties are deemed to have contemplated only the damages and injury which the creditor might suffer from the non-performance of the obligations in respect to the particular thing which is the object of it, and not such as may have been accidentally occasioned thereby in respect to his own (other) affairs." But this rule had no application to the case then before the court. It applies only to cases where, by reason of special circumstances having no necessary connection with the contract broken, damages are sustained which would not ordinarily or naturally flow from such breach: as where a party is prevented by the breach of one contract from availing himself of some other collateral and independent contract entered into with other parties, or from perfoming some act in relation to his own business not necessarily connected with the agreement. An instance of the latter kind is where a Canon of the church, by reason of the non-delivery of a horse pursuant to agreement, was prevented from arriving at his residence in time to collect his tithes.

In such cases the damages sustained are disallowed, not because they are uncertain, nor because they are merely consequential or remote, but because they cannot be fairly considered as having been within the contemplation of the parties at the time of entering into the contract. Hence the objection is removed, if it is shown that the contract was entered into for the express purpose of enabling the party to fulfil his collateral agreement, or perform the act supposed. (Sedg. on Dam., ch. 3.)

In Blanchard v. Ely the damages claimed consisted in the loss of the use of the very article which the plaintiff had agreed to

construct; and were, therefore, in the plainest sense, the direct and proximate result of the breach alleged. Moreover, that use was contemplated by the parties in entering into the contract, and constituted the object for which the steamboat was built. It is clear, therefore, that the rule of Pothier had nothing to do with the case. Those damages must then have been disallowed, because they consisted of profits depending, not, as in the case of a contract to transport goods, upon a mere question of market value, but upon the fluctuations of travel and of trade, and many other contingencies. The citation by Judge Cowen, of the maritime cases to which I have referred, tends to confirm this view. This case, therefore, is a direct authority in support of the doctrine that whenever the profits claimed depend upon contingencies of the character referred to, they are not recoverable.

The case of Masterton v. The Mayor, &c., of Brooklyn, 7 Hill, 61, decides nothing in opposition to this doctrine. It simply goes to support the other branch of the rule, viz., that profits are allowed where they do not depend upon the chances of trade, but upon the market value of goods, the price of labor, the cost of transportation, and other questions of the like nature, which can be rendered reasonably certain by evidence.

From these authorities and principles it is clear that the defendants were not entitled to measure their damages by estimating what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits.

But it by no means follows that no allowance could be made to the defendants for the loss of the use of their machinery. It is an error to suppose that "the law does not aim at complete compensation for the injury sustained," but "seeks rather to divide than satisfy the loss." (Sedg. on Dam., ch. 3.) The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain; both

in their nature and in respect to the cause from which they proceed.

The familiar rules on the subject are all subordinate to these. For instance: That the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be not the remote but proximate consequence of such breach, and must not be speculative or contingent, are different modifications of the last.

These two conditions are entirely separate and independent, and to blend them tends to confusion; thus the damages claimed may be the ordinary and natural, and even necessary result of the breach, and yet, if in their nature uncertain, they must be rejected; as in the case of Blanchard v. Ely, where the loss of the trips was the direct and necessary consequence of the plaintiff's failure to perform. So they may be definite and certain, and clearly consequent upon the breach of contract, and yet if such as would not naturally flow from such breach, but, for some special circumstances, collateral to the contract itself or foreign to its apparent object, they cannot be recovered; as in the case of the loss by the clergyman of his tithes by reason of the failure to deliver the horse.

Cases not unfrequently occur in which both these conditions are fulfilled: where it is certain that some loss has been sustained or damage incurred, and that such loss or damage is the direct, immediate and natural consequence of the breach of contract, but where the amount of the damages may be estimated in a variety of ways. In all such cases the law, in strict conformity to the principles already advanced, uniformly adopts that mode of estimating the damages which is most definite and certain. The case of Freeman v. Clute, 3 Barb. S. C. R., 424, is a case of this class, and affords an apt illustration of the rule. That case was identical in many of its features with the present. The contract there was to construct a steam engine to be used in the process of manufacturing oil, and damages were claimed for delay in furnishing it. It was insisted in that case, as in this, that the damages were to be estimated by ascertaining the amount of business which could have been done by the use of the engine, and the profits that would have thence accrued. This claim was rejected by Mr. Justice Harris, before whom the cause was tried, and upon the precise ground taken here. But he nevertheless held that compensation was to be allowed for the "loss of the

plaintiff's mill and other machinery." He did not, it is true, specify in terms the mode in which the value of such use was to be estimated; but as he had previously rejected the probable profits of the business as the measure of such value, no other appropriate data would seem to have remained but the fair rent or hire of the mill and machinery; and such I have no doubt was the meaning of the judge. Thus understood, the decision in that case, and the reasoning upon which it was based, were I think entirely accurate.

Had the defendants in the case of Blanchard v. Ely, *supra*, taken the ground that they were entitled to recoup, not the uncertain and contingent profits of the trips lost, but such sum as they could have realized by chartering the boat for those trips, I think their claim must have been sustained. The loss of the trips, which had certainly occurred, was not only the direct but the immediate and necessary result of the breach of the plaintiffs' contract.

The rent of a mill or other similar property, the price which should be paid for the charter of a steamboat, or the use of machinery, &c., &c., are not only susceptible of more exact and definite proof, but in a majority of cases would, I think, be found to be a more accurate measure of the damages actually sustained in the class of cases referred to, considering the contingencies and hazards attending the prosecution of most kinds of business, than any estimate of anticipated profits; just as the ordinary rate of interest is upon the whole a more accurate measure of the damages sustained in consequence of the non-payment of a debt than any speculative profit which the creditor might expect to realize from the use of the money. It is no answer to this to say that, in estimating what would be the fair rent of a mill, we must take into consideration all the risks of the business in which it is to be used. Rents are graduated according to the value of the property and to an average of profits arrived at by very extended observation; and so accurate are the results of experience in this respect that rents are rendered nearly if not quite as certain as the market value of commodities at a particular time and place.

The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of the business; and this is the rule

which I understand the referee to have adopted. There is no error in the other allowances made by the referee. The judgment should therefore be affirmed.

BRIGHAM *v.* CARLISLE.

Alabama, 1884. 78 Ala. 243.

CLOPTON, J. * * * The material question is the measure of damages. The primary purpose of awarding damages is actual compensation to the party injured, whether by a tort or by breach of contract, though there are exceptional cases, in which exemplary or punitive damages are allowed. Owing to the ever-occurring differences in the circumstances and in the special conditions of the contracting parties, it has been found difficult, if not impossible, to lay down general and definite rules as to the measure of damages, applicable to all cases of a class. From a misconstruction of expressions of eminent jurists, not sufficiently guarded for general use, but adapted to the case in hand, the applications of rules, commonly recognized, have been as various as the cases. The proposition, that all damages are recoverable which are in the contemplation of the parties, is not strictly correct. The primary rules are, the damages must be the natural and proximate results of the wrong complained of and the law must not be merely speculative, or conjectural. These must concur, though founded on different principles, and are distinct and independent of each other. The law presumes that a party foresees the natural and proximate results of a breach of his contract or tort, and hence these are presumed to be in his legal contemplation. For such damages, as a general rule, the party at fault is liable.

But there are damages, which are in the contemplation of the parties at the time of making the contract, and are the natural and proximate results of its breach, which are not recoverable. The parties must necessarily contemplate the loss of profits as the direct and necessary consequences of the breach of a contract, and yet all profits are not within the scope of recoverable damages. There are numerous cases, however, in which profits constitute, not only an element, but the measure of damage. While the line of demarcation is often dim and shadowy, the distinctive features consist in the nature and character of the profits. When they form an elemental constituent

of the contract, their loss, the natural result of its breach, and the amount can be estimated with reasonable certainty, such certainty as satisfies the mind of a prudent and impartial person, they are allowed. The requisite to their allowance is some standard, as regular market values or other established *data*, by reference to which the amount may be satisfactorily ascertained. Illustrations of profits recoverable are found in cases of sales of personal property at a fixed price, evictions of tenants by landlords, articles of partnership, and many commercial contracts.

On the other hand, "mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot under any circumstances be brought within the range of recoverable damages." 1 Suth. Dam. 141. Profits speculative, conjectural, or remote, are not generally regarded as an element in estimating the damages. In Pollock v. Gantt, 69 Ala. 373; s. c., 44 Am. Rep. 519, it is said: "What are termed speculative damages—that is possible, or even probable gains, that it is claimed would have been realized, but for the tortious act or breach of contract charged against a defendant—are too remote, and cannot be recovered." The same rule has been repeatedly asserted by this court. Culver v. Hill, 68 Ala. 66; Higgins v. Mansfield, 62 Ala. 267; Burton v. Holley, 29 Ala. 318; s. c., 65 Am. Dec. 401; White v. Miller, 71 N. Y. 118; s. c., 27 Am. Rep. 13; French v. Ramge, 2 Neb. 254; 2 Smith Lead. Cases, 574; Olmstead v. Burke, 25 Ill. 86. The two following cases may serve to illustrate the difference between profits recoverable and not recoverable. In Aetna Life Ins. Co. v. Nexsen, 84 Ind. 347; s. c., 43 Am. Rep. 91, an insurance agent who had been discharged without cause before the expiration of his contract, was allowed to include in his recovery the probable value of renewals on policies previously obtained by him, upon which future premiums would, in the usual course of business, be received by the company, on the ground that the amount of compensation, due on such renewals, can be ascertained with requisite certainty by the use of actuary's life-tables and comparisons, and that the basis of the right to damages existed and was not to be built in the future. In Lewis v. Atlas Mut. Ins. Co., 61 Mo. 534,

which is cited with approval in the other case, the same rule as to the probable value of renewals was held, but it was also held, that an estimate of the probable earnings of the agent thereafter, derived from proof of the amount of his collections and commissions before the breach of the contract, in the absence of other proof, is too speculative to be admissible.

Profits are not excluded from recovery, because they are profits; but when excluded, it is on the ground that there are no *criteria* by which to estimate the amount with the certainty on which the adjudications of courts, and the findings of juries should be based. The amount is not susceptible of proof. In 3 Suth. Dam. 157, the author discriminatingly observes: "When it is advisedly said that profits are uncertain and speculative, and cannot be recovered, when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because profits are necessarily speculative, contingent and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore it is more a general truth than a general principle, that a loss of profits is no ground on which damages can be given." When not allowed because speculative, contingent, and uncertain, their exclusion is founded by some on the ground of remoteness, and by others, on the presumption that they are not in the legal contemplation of the parties.

The plaintiff, by the contract, undertook the business of traveling salesman for the defendants. The amount of his commissions depended not merely on the number and amounts of sales he might make, but also on the proportional quantity of the two classes of goods sold, his commissions being different on each. The number and amounts of sales depended on many contingencies, the state of trade, the demand for such goods, their suitableness to the different markets, the fluctuations of business, the skill, energy, and industry with which he prosecuted the business, the time employed in effecting different sales, and upon the acceptance of sales by the defendants. There are no *criteria*, no established *data*, by reference to which the profits are capable of any estimate. They are purely speculative and conjectural. Besides, the evidence is the mere opinion and conjecture of the plaintiff without giving any facts on which it was based. The bare statement, uncorroborated by any facts, and without a basis,

that "the reasonable sales would have been $15,000, and that the net profits on that amount of sales would have been $450," is too conjectural to be admissible. Washburn v. Hubbard, 6 Lans. 11.

Reversed and remanded.

WRIGHT *v.* MULVANEY.

Wisconsin, 1890. 78 Wis. 89.

The plaintiffs were fishermen in Green Bay, and had what is called a pound or a pot net set near the direct route from the mouth of Oconto river to Peshtigo Harbor. The defendant negligently ran into the net with a steam tug and injured it while en route toward Peshtigo Harbor. The plaintiff recovered a judgment for $310. Defendant appeals.

LYON, J. * * * There is, included in the judgment, $200 for damages to the plaintiffs' business resulting from the injury to their net—that is to say, for loss of the profits of their business during the time necessarily required to restore the net. The net was never restored, and the plaintiffs' fishing in that vicinity for the remainder of the season was all done with another net located about one-half mile south of the injured net. The testimony tends to show that the plaintiffs lifted the pot of their net and took the fish therefrom about every alternate day before the injury; that the profits of each lift were from $40 to $50; and that it would have required about 10 days to restore the injured net, had it been restored. There was no other testimony introduced bearing upon the question of profits. Hence, the jury necessarily assessed the damages to plaintiffs' business on the basis of four or five lifts of fish, at a profit of from $40 to $50 each.

There was no testimony as to whether the conditions of successful fishing remained for 10 days after the injury as favorable as they were immediately before the same,—none to show that the weather continued favorable during the 10 days; that storms did not intervene to interrupt the business; that the fish continued to run over the same ground in equal abundance; that other fishermen operating in the vicinity were equally as successful in their business after as before the injury; nor that the market price of fish remained as high. Without any testimony concerning these essential conditions, the jury must have made

their assessment of damages to plaintiffs' business largely upon mere conjecture. They must have assumed without proof that a business proverbially uncertain in results, depending for its success upon numerous conditions which the persons engaged therein cannot control or influence, and the presence or absence of which at a future time cannot be foretold with any degree of accuracy, would have continued after the net was injured to be just as profitable as it was before the injury. Such an assumption, under such circumstances, is unwarranted in the law, and probably we should be compelled to reverse this judgment for want of sufficient evidence to support the assessment of damages for profits, even though it should be held that, under proper proofs, the plaintiffs might recover prospective profits.

But we are of the opinion that prospective profits cannot properly be awarded as damages in this case. The reasons therefor has already been suggested, which is that under any state of the testimony, in view of the character and conditions of the business, the jury could have no sufficient basis for ascertaining such prospective profits. At best, the assessment thereof must necessarily rest largely upon conjecture. This feature of the case brings it within the rule of Bierbach v. Rubber Co., 54 Wis. 208, and Anderson v. Sloane, 72 Wis. 566, and the cases cited in the opinions therein. In the latter case, Mr. Justice Taylor has pointed out the distinction between that case and those cases in this court in which prospective profits have been allowed as damages. It is unnecessary to repeat the discussion here. It is sometimes quite difficult to determine to which of the above classes a given case belongs, and such determination must be governed largely by the special circumstances of each particular case.

The jury assessed the damages to the net at $110. This includes not only the cost of repairing it, but also the value of the services of the plaintiffs and their servants in resetting it. We conclude that the plaintiffs are entitled to recover no other damages, except the value of the use of the net during the time they were necessarily deprived of its use, which was about 10 days.

By the Court. *The judgment of the Circuit Court is reversed, and the cause will be remanded with directions to award a new trial, or, at the option of the plaintiffs, to give judgment for them for $110 and interest thereon from the date of the verdict, besides costs.*

BETHEL & CO. *v.* SALEM IMPROVEMENT CO.

Virginia, 1896. 93 Va. 354.

The defendant company agreed by contract under seal to purchase of plaintiff 1,500,000 bricks, to be burned for it by plaintiff. After plaintiff had manufactured 803,491 bricks the defendant notified the plaintiff that it would not receive any more. It did not pay for those already manufactured, excepting the sum of $3,212.31. Plaintiff seeks to recover a profit, which he alleges would have been made, of $3 per thousand on the bricks unburned, and also to recover the balance due on the purchase price of those completed. A verdict of $1,403.04 for plaintiff was set aside by the lower court, and the plaintiff complains thereof. The ground for such action was the giving of an instruction authorizing the recovery of the profits claimed.

KEITH, PRESIDENT. * * * The failure to pay the money is the cause alleged in the instruction, that forced the plaintiffs to stop the manufacture of the bricks, and which entitles the plaintiffs to recover, not only for the bricks manufactured by them according to said contract, but for the profit on the difference between the number of the bricks so manufactured by them, and the 1,500,000 bricks manufactured according to the terms of the contract, to be ascertained by placing the bricks at the price fixed in the contract, and deducting therefrom the cost of the bricks as shown by the evidence.

For the breach of contract to pay money, no matter what the amount of inconvenience sustained by the plaintiff, the measure of damages is the interest of the money only. Wood's Mayne, Dam. (1st Am. Ed.) p. 15. (Citing authorities.) * * *

Many instances of a like character might be given, but we have seen no case which will sustain the instruction under consideration. It is the ordinary case of a failure to comply with a contract to pay money at a stipulated time. In such cases the measure of damages for the breach of the contract is the principal sum due, and legal interest thereon. To make a defendant responsible for the profits which might have accrued to the plaintiff by the use of the money in addition to the interest would be harsh and oppressive, and should not be sanctioned by the court, unless the plaintiff can bring his case within some well-recognized exception to the rule. * * *

Affirmed.

STEVENS *v.* YALE.

Michigan, 1897. 113 Mich. 680.

The plaintiffs, druggists, purchased of defendant an order of toilet preparations, "beautifiers for women," and defendant agreed to print plaintiffs' names at the bottom of all defendant's advertisements in the Detroit newspapers as carrying defendant's preparations for sale. After eight months defendant ceased to so print plaintiffs' names, and inserted instead that of another house as wholesale agents in Detroit. Action to recover damages for failure so to print plaintiffs' names. Verdict directed for defendant, the judge holding that there was a want of mutuality in the contract; and second, that all damages, attempted to be shown, were speculative.

HOOKER, J. * * * We need not discuss the question of the validity of this contract. If it be treated as valid, and it be admitted that there was a breach of the contract by the defendant, the damages sought to be recovered were speculative. The injury suffered, if any, was a loss of such profits as would have resulted from advertising,—a matter of mere conjecture, depending upon the number who might read and act upon the advertisement. [Citing authorities.] We have held in several cases that loss of profits may be recovered where the loss of profits and their amount can be shown with certainty. But here the effect of this failure to advertise is most uncertain, and the circuit court was correct in holding that such damages were not recoverable.

Counsel for the defendant urge that a new trial should be granted because the plaintiff was entitled to nominal damages. This action was commenced in circuit court, and under the statute the plaintiff would not be entitled to costs upon a judgment for nominal damages, and the judgment should not be reversed upon this ground. Hickey v. Baird, 9 Mich. 38; Haven v. Manufacturing Co., 40 Mich. 290.

The judgment is affirmed.
The other Justices concurred.

WEIR *v.* UNION RAILWAY CO.

New York, 1907. 188 N. Y. 416.

CHASE, J. The plaintiff recovered judgment in this action against the defendant for personal injuries resulting from the fall of a fare indicator or register in one of defendant's street cars on which the plaintiff was a passenger. An appeal was taken from said judgment to the Appellate Division of the Supreme Court, where it was unanimously affirmed. The appeal is taken to this court pursuant to an order of the said Appellate Division allowing the same, and in which order it is certified that, in the opinion of the court, a question of law is involved which ought to be reviewed by this court. The only question of law involved arises upon rulings of the trial court upon objections to questions involving the profits of the business conducted by the plaintiff.

The plaintiff, who is usually employed as a boatman, had for six or seven months prior to the accident rented a room which immediately adjoined the street along the side of a liquor store. In the room, the dimensions of which were 5 by 16 feet, he conducted a lunch business and sold oysters, clams, crabs, lobsters, beef stew, and fish. There were sittings in the room for six or eight people, and the food was eaten by purchasers at the plaintiff's place of business. During some portion of the time that he was conducting such business he employed therein two or three men, and at the time of the accident he was employing one man. Oysters and clams were opened as ordered, and they were the principal articles of food sold, and the plaintiff purchased them by the barrel. The supplies purchased by the plaintiff varied in price and the amounts sold varied to such an extent that the number of persons employed had to be changed from time to time. It does not appear that it required any particular skill or ability to do the work of managing the business that the plaintiff was conducting, or that the plaintiff had any particular skill or ability in opening oysters or clams or in serving food to others. The trial court allowed the plaintiff to testify that he was doing a business of about $120 and sometimes $140 a week, and that his expenses each week for help were $10 or $12, and for stock $40, and that his rent was $10 a month, and that the remainder of the proceeds of his business was profit. This testimony was given subject to objections on the part of the de-

fendant that it was incompetent, immaterial and irrelevant, and as calling for special damages not pleaded by the plaintiff, and that it related to a business in which the plaintiff had capital invested. The objections of the defendant were overruled, and the defendant excepted to the ruling of the court.

Where a person by reason of personal injuries has been prevented from performing the work or services in which he was engaged at the time of the injury, the loss of time occasioned thereby and also any loss or diminution of future earning power are elements of damage to be considered by a jury. A loss of income can be shown and considered when such income is derived from personal effort or particular skill and ability as distinguished from the profits of a business in which capital is invested and which is dependent upon the continuance of the business as well as the capital, but mere profits of a business as such cannot be considered in measuring the damages arising from such loss of time or diminution of earning power. In this case the business did not require a large capital or many employees, but the questions expressly called for the profits of a business, and not for the value of plaintiff's personal services in connection therewith. This is apparent from all the testimony in the case, and it is particularly shown from the fact that it had been the practice of the plaintiff to leave the business with his employees when he was absent, and from the further fact that the business was continued for several weeks after the accident, although the plaintiff was not personally present. At the time when the plaintiff, as he says, wound up the business he had sufficiently recovered, so that he went to the office of his physician frequently for treatment, and it does not appear that the plaintiff could not have continued the business by the employment of help until he had fully recovered, or until he could have attended at the place of business to supervise the same. The testimony should have been confined to the value of the plaintiff's individual services during the time he was unable by reason of his personal injuries, to perform the same.

In Masterton v. Village of Mt. Vernon, 58 N. Y. 391, 396, the court, referring to cases therein mentioned, says: "In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably

be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages." In referring to the case of Walker v. Erie R. R. Co., 63 Barb. 260, in which it was held that proof of the amount of the income derived by the plaintiff in that action in the practice of his profession as a lawyer was competent, the court say: "This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended." The court further say: "The profits of importing and selling teas are still more uncertain. In some years they may be large, and in others attended with loss. The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time."

In this case the profits of the business were subject to many uncertainties and contingencies, among which were his ability to continue the business in the place and as theretofore conducted, the amount of competition that he might at any time encounter, and the variation in the price of supplies to be purchased. The respondent refers to the recent case of Kronold v. City of New York, 186 N. Y., 40, as sustaining his contention. In that case, although the plaintiff maintained an office and had invested about $1,000 of capital, nevertheless his income was derived from the sale of Swiss embroideries. The embroideries were sold from designs or drawings shown from sample embroideries, and the orders were procured by the plaintiff as a canvasser and by his personal solicitation. In that case, after reviewing the authorities, it was held in substance that where the facts disclose such a preponderance of the business element over the personal equation, or such an admixture of the two, that the question of personal earnings could not be safely or properly segregated from returns upon capital invested, the income or profits from a business should not be considered in determining the amount of the damages to which the plaintiff is entitled.

The question of personal earnings is too much involved in this case with the ordinary chances of a business venture to allow the profit on the plaintiff's business to be considered in determining what damages the defendant should pay to the plaintiff.

The judgment should be reversed and a new trial granted, with costs to abide the event.

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(5) *Expenses.*

ELLIS *v.* HILTON.

Michigan, 1889. 78 Mich. 150.

LONG, J. This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured.

It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal.

A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him $35 for cure and treatment. On his cross-examination, he also testified that the veterinary said "there was hopes of curing her, if the muscles were not too badly bruised. He didn't say he could cure her. He thought there was a chance he might."

Dr. DeCow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court

below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure. Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright, the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this $35 in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation.

Counsel for defendant contends that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total. There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in Watson v. Bridge, 14 Me. 201, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss." In Murphy v. McGraw, 41 N. W. Rep. 917, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense, and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. This is the only error we need notice. The judgment of the court below must be reversed, with costs, and a new trial ordered. *All concur.*

BERNSTEIN *v.* MEECH.

New York, 1891. 130 N. Y. 354.

BRADLEY, J. By contract of date August 4, 1887, between the parties, the defendants agreed to furnish to the plaintiff the opera house known as the Academy of Music, in the city of Buffalo, December twenty-second, twenty-third, and twenty-fourth, for four performances by the Jarbeau Comedy Company, and for that purpose the plaintiff agreed to furnish the services of that company during that time, and to take as the consideration fifty per cent of the gross receipts of all sums realized from the performances. When this contract was executed, each of the parties had the right to assume that the other would observe its stipulations. The performances did not take place, and the reason why they did not, the plaintiff charges, was attributable to the breach of the contract by the defendants. The purpose of this action was to recover damages as the consequence.

The controversy involved the construction of correspondence had between the parties. * * *

There was no error in the refusal of the court to direct a verdict for the defendants.

The remaining questions have relation to the damages which were the subject of the plaintiff's recovery. The general rule on the subject would permit him, in case of breach by the defendants, to recover the value of his contract. And that was dependent upon the receipts to be realized from the contemplated performances by the plaintiff's company. The results which would in that respect have been produced if the company had been permitted to perform the contract were specula-

tive, and by no probative means ascertainable. It is contended on the part of the defendants that recovery could be founded on no other basis, and therefore the plaintiff could recover nominal damages only. The value of the contract to the plaintiff was in the profits, and in the amount of them which may have been realized over his expenses attending its performance. Those profits not being susceptible of proof, were not the subject of recovery. But by the breach of the contract by the defendants, the plaintiff was denied the opportunity which the observance of it could have given him to realize fifty per centum of such receipts as would have been produced by it. His loss also consisted of the expenses by him incurred to prepare and provide for such performance. While the plaintiff was unable to prove the value in profits of his contract, he was properly permitted to recover the amount of such loss, as it appeared he had suffered by the defendants' breach. Griffin v. Colver, 16 N. Y. 489. The evidence warranted the conclusion that the plaintiff, through his agent, made preparations for the performance of the contract, and that the plaintiff with his troupe appeared at Buffalo, prepared and in readiness to do so. The amount of his expenses incurred for the purpose of such performance was proved, and they were the basis of the recovery. It is unnecessary to refer specifically to the items of those expenses. The jury were, upon the evidence, permitted to find that, to the amount of the recovery, they were legitimately incurred for the purposes of the performance of the contract, and that with a view to such purpose the plaintiff suffered a loss to that extent. Those expenses may be deemed to have been fairly within contemplation when the contract was made. It cannot be assumed that any part of this loss would have been sustained by the plaintiff if he had been permitted to perform his contract. And assuming, as we must here, that the exclusion of the plaintiff's company from the use of the opera house at the time in question was caused by the defendants' breach of the contract, the plaintiff's loss, equal to the amount of his expenses legitimately and essentially incurred for the purpose of its performance, was the consequence of their default, and properly recoverable by him. Driggs v. Dwight, 17 Wend. 71; Giles v. O'Toole, 4 Barb. 261; Taylor v. Bradley, 39 N. Y. 129, 142. These views lead to the conclusion that none of the exceptions were well taken, and that the judgment should be affirmed.

a *Physician's Fees.*

SIBLEY *v.* NASON.

Massachusetts, 1907. 196 Mass. 125.

Several questions are raised respecting the effect upon the plaintiff's right to maintain his action and the damages he may recover, growing out of the fact that in March, 1904, he was duly adjudged a bankrupt and the ordinary proceedings were had; the accident having occurred on the 11th day of July, 1902, and this action having been begun on the 9th of August, 1902. It is first urged that the plaintiff is debarred from the right to maintain his action by reason of the bankruptcy. The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451]) provides in section 70a that "the trustee * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt, * * * to all (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him; * * * (6) rights of action arising upon contracts or from the unlawful taking or detention or from injury to his property." This action, having been brought for damages to the person of the plaintiff, could not by any means have been transferred by him. Rice v. Stone, 1 Allen, 566; Robinson v. Wiley, 188 Mass. 533; Flynn v. Butler, 189 Mass. 377. It was not property nor a right of property until it was reduced to a judgment. Stone v. Boston & Maine Railroad, 7 Gray, 539. It could not be reached by trustee process. Thayer v. Southwick, 8 Gray, 229; Wilde v. Mahaney, 183 Mass. 455. Nor could it be reached in equity by a creditors' bill. Bennett v. Sweet, 171 Mass. 600; Billings v. Marsh, 153 Mass. 311. The liability being disputed, the claim was not subject to taxation and therefore could not be levied upon or reached by the assessor or tax collector. Deane v. Hathaway, 136 Mass. 129. Thus it appears that the claim which the plaintiff was prosecuting against the defendant is not properly described by any of the phraseology in subsection 5. Subsection 6 is limited to rights of action arising upon contract or respecting property and does not include an action of tort for personal injuries. It is not, and never has been, the policy of the law to coin into money for the profit of his creditors the bodily pain, mental anguish or outraged feelings

of a bankrupt. None of the federal or English bankruptcy acts, nor our own insolvency statutes, have gone to that length. It has been held that the following actions do not pass to the trustee or assignee: Malicious prosecution (In re Haensell [D. C.] 91 Fed. 357; Noonan v. Orton, 34 Wis. 259; Francis v. Burnett, 84 Ky. 223); slander (Dillard v. Collins, 25 Grat. [Va.] 343); seduction of servant (Howard v. Crowther, 8 M. & W. 601); malicious attachment (Brewer v. Dew, 11 M. & W. 625); deceit (In re Crocket, Fed. Cas. No. 3,402); malicious trespass (Rogers v. Spence, 12 Cl. & Fin. 700); trespass to ship (Bird v. Hempsted, 3 Day [Conn.] 272); trespass accompanied by personal annoyance (Rose v. Buckett [1901] 2 K. B. D. 449); negligence of an attorney (Wetherell v. Julius, 10 C. B. 267).

It is also urged that the plaintiff is not entitled to recover, as an element of damage, for the wages which he would have earned between the date of his accident and his adjudication in bankruptcy. If the defendant's requests for instructions be construed narrowly, they were properly refused, for the reason that under the bankruptcy act property acquired between the date of the filing of the petition and the date of the adjudication in bankruptcy does not pass. But, looking at the question broadly, the contention cannot be sustained. The cause of action for which the plaintiff was entitled to recover damages on account of the pain and suffering which he had endured and was likely to endure, as well as his loss of time, was indivisible. Doran v. Cohen, 147 Mass. 342. Moreover, the wages which the plaintiff might have earned, if not injured, are not strictly recoverable. The value of his time, while prevented from working by reason of the negligence of the defendant, is a proper element to be considered in fixing the damages. Braithwaite v. Hall, 168 Mass. 38; Whipple v. Rich, 180 Mass. 477. The personal injury is the gist of the action. The other elements of damage are incidents only of this main cause of action. Prayers 8 and 9 were therefore properly refused.

The final question argued is that the plaintiff was not entitled to recover for debts incurred for physicians' services, never paid by the plaintiff, but proved against his estate in bankruptcy or included in his schedules. A plaintiff in an action for personal injury is entitled to recover for reasonable expenditures for nursing and physicians' care rendered necessary by the wrongful act of the defendant. Turner v. B. & M. R. R., 158 Mass. 261;

McGarrahan v. N. Y., N. H. & H. R. R., 171 Mass. 211; Atwood v. Boston Forwarding & Transfer Co., 185 Mass. 557; Scullane v. Kellogg, 169 Mass. 544. It may be assumed that the bills incurred by the present plaintiff for physicians' services would be barred by his discharge in bankruptcy. This fact, however, does not prevent the plaintiff from treating such obligations as debts of honor. It is through no virtue of the defendant that the plaintiff will be enabled to interpose any defense to the payment of a reasonable charge for these services for the amelioration of his suffering, but rather the clemency of the law to his financial distress. Under these circumstances, the law ought not to prevent or discourage the exercise of a debtor's conscience respecting his past indebtedness. See Klein v. Thompson, 19 Ohio St. 569; Denver, etc., Co. v. Lorentzen, 79 Fed. 291.

Exceptions overruled.

SCHMITT *v.* KURRUS.

Illinois, 1908. 234 Ill. 578.

Action for assault and battery.

CARTWRIGHT, C. J. John Schmitt, the appellee, brought this action of trespass for assault and battery against F. J. Kurrus, the appellant, in the city court of East St. Louis. There was a plea of not guilty and a trial by jury, which ended with a verdict finding the appellant guilty and assessing appellee's damages at $1,690.10. The court overruled a motion for a new trial and entered judgment on the verdict. The Appellate Court for the Fourth District affirmed the judgment.

The facts proved are substantially as follows: The defendant had attended a meeting of his lodge on the night of July 6, 1906, and afterward went with five of his friends to a restaurant, where he had a supply of fresh croppies which he had previously arranged to have fried for a supper. The party remained at the restaurant until near midnight and had supper, during which they each drank four glasses of beer. They left the restaurant about midnight, and in passing along the street came to the place of business of the Bodenburg Commission Company, which dealt in fruits and green vegetables of all kinds. The plaintiff was a salesman, and was the foreman in charge of the store after 11 o'clock at night. The store was kept open at night, and melons and other fruits were piled on the sidewalk to be ready for busi-

ness in the morning. As the party reached the store two colored men were sitting on the sidewalk eating a melon. The party stopped, and there was evidence tending to prove that one of them dropped a melon and broke it. At any rate, the defendant took a melon from the pile and walked off with it. The plaintiff had been to lunch, and coming back saw a broken melon on the walk and called upon the party to pay for it. One of them gave the plaintiff 50 cents, which he received as pay for the broken melon, and in the meantime another clerk had followed the defendant for the purpose of getting the melon which he took or securing pay for it. The defendant gave the melon back, saying that it was only a joke, and then came back to the store, where he learned that his companion had paid the plaintiff 50 cents. He testified that he understood that the 50 cents was for the melon that he had returned, but the plaintiff understood that it was for the broken melon. The defendant demanded from the plaintiff a return of the money, but plaintiff told him that he could not return it, that he had rung it up in the cash register, and that defendant would have to see Mr. Bodenburg about it. There was an altercation, in which the defendant used violent and profane language, and continued to demand the money. The plaintiff said that he would call a policeman, and went into the store and inside of the office, which was partitioned off. He went into the telephone booth, intending to call Mr. Bodenburg, and took down the receiver and was waiting for the answer from the central office. The defendant had followed him to the door of the booth, and the evidence for the plaintiff was that the defendant struck the glass door of the booth with his fist and broke it. A piece of the glass went into the plaintiff's eye, and a board nailed on the inside of the door with a list of grocerymen that the store would ring for on the telephone was knocked off. Defendant testified that he did not strike the glass, and that was his only defense.

During the course of the trial the plaintiff sought to prove what he had paid to doctors for medical and surgical treatment for his injury, and the defendant objected, stating that his objection was that the proper method was to prove what would be a fair and reasonable charge, and there was then no evidence to show that the fee charged was the usual and customary one. The objection was overruled and the evidence admitted. In order to recover for medical and surgical services and treatment,

it was necessary for the plaintiff to prove two things: First, that he had paid or become liable to pay a specified amount; and, second, that the charges made were the usual and reasonable charges for services of that nature. He could recover no more than the amount which he had paid or become liable to pay, even if it was less than the usual and reasonable charge for such services; and, on the other hand, he could not recover more than such usual and reasonable charge even if he had paid more. North Chicago Street Railway Co. v. Cotton, 140 Ill. 486. The first essential fact to be proved was what the plaintiff had paid. The defendant might properly have insisted upon an assurance that the further requisite proof would be made and the court might properly have required such an assurance from plaintiff, but the evidence was competent when offered, and the court did not err in the ruling. When it was not followed by proof that the charge was the usual and reasonable one, the defendant might have moved the court to strike out the evidence, which the court undoubtedly would have done, and advised the jury that no allowance could be made on account of it.

It is also contended that the court erred in admitting evidence of the financial condition of the parties. The plaintiff was allowed to prove that he was a poor man, having nothing but a little household furniture and owing considerable debts, and also to prove the value of defendant's property. The actual damages suffered could not be increased or diminished on account of the financial condition of the parties; but it was early settled in this state in the case of McNamara v. King, 2 Gilman, 432, that, in actions of trespass for assault and battery, the condition in life and circumstances of the parties are proper subjects for the consideration of the jury in estimating the damages. In such actions the jury may allow damages, not only to compensate the plaintiff, but also to punish the defendant according to the circumstances of the case, and for that purpose may take into consideration the pecuniary resources of the defendant. The principle has been extended to other classes of cases where exemplary damages are recoverable. Cochran v. Ammon, 16 Ill. 316; Peters v. Lake, 66 Ill. 206; White v. Murtland, 71 Ill. 250. This was a proper case for the allowance of exemplary damages and the evidence of financial condition was proper. The money which the defendant was demanding was not his, and there was no excuse whatever for the assault.

The seventh instruction authorized the jury to take into account the financial circumstances of the plaintiff and the defendant if they found that the defendant committed the assault and caused the injury to the plaintiff's eye, as alleged in the declaration. If the assault was proved, the case was clearly one where exemplary damages might be recovered, and the instruction was not erroneous.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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(6) *Pain and Suffering.*

GOODHART *v.* PENNSYLVANIA R. R. CO.

Pennsylvania, 1896. 177 Pa. 1.

WILLIAMS, J. The plaintiff received the injury complained of while a passenger on one of the trains of the defendant company. * * * Damages for a personal injury consist of three principal items: First, the expenses to which the injured person is subjected by reason of the injury complained of; second, the inconvenience and suffering naturally resulting from it; third, the loss of earning power if any, and whether temporary or permanent, consequent upon the character of the injury. Owens v. Railway Co., 155 Pa. 334.

The expenses for which a plaintiff may recover must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. The plaintiff cannot recover for the nursing and attendance of the members of his own household, unless they are hired servants. The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection, which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred. A man may hire his own adult children to work for him in the same manner and with same effect that he may hire other persons, but, in the absence of an express contract, the law will not presume one, so long as the family relation continues.

Pain and suffering are not capable of being exactly measured by an equivalent in money, and we have repeatedly said that they have no market price. The question in any given case is

not what it would cost to hire some one to undergo the measure of pain alleged to have been suffered by the plaintiff, but what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in consideration of suffering necessarily endured. Baker v. Pennsylvania Co., 142 Pa. 503. This should not be estimated by a sentimental or fanciful standard, but in a reasonable manner, as it is wholly additional to a pecuniary compensation afforded by the first and third items that enter into the amount of the verdict in such cases.

By way of illustration, let us assume that a plaintiff has been wholly disabled from labor for a period of 20 days in consequence of an injury resulting from the negligence of another. This lost time is capable of exact compensation. It will require so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling. But let us further assume that these days of enforced idleness have been days of severe bodily suffering. The question then presented for the consideration of the jury would be: What is it reasonable to add to the value of the lost time in view of the fact that the days were filled with pain, instead of being devoted to labor? Some allowance has been held to be proper; but, in answer to the question, "How much?" the only reply yet made it that it should be reasonable in amount.

Pain cannot be measured in money. It is a circumstance, however, that may be taken into the account in fixing the allowance that should be made to an injured party by way of damages. An instruction that leaves the jury to regard it as an independent item of damages, to be compensated by a sum of money that may be regarded as a pecuniary equivalent, is not only inexact, but it is erroneous. The word "compensation," in the phrase "compensation for pain and suffering," is not to be understood as meaning price or value, but as describing an allowance looking toward recompense for or made because of the suffering consequent upon the injury. In computing the damages sustained by an injured person, therefore, the calculation may include not only loss of time and loss of earning power, but, in a proper case, an allowance because of suffering.

The third item, the loss of earning power, is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the acci-

dent happened to him, and the ability of the same person to earn money by labor physical or intellectual, after the injury was received.

Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. The word "earnings" means the fruit or reward of labor; the price of services performed. Anderson's Law Dictionary, 390. Profits represent the net gain made from an investment, or from the prosecution of some business, after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community, may make an enterprise a decided success, which under less favorable circumstances, in the hands of the same persons, might turn out a failure. The profits of a business with which one is connected cannot, therefore, be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value. Its admission for that purpose was error.

It was also error to treat this subject of the value of earning power as one to be settled by expert testimony. An expert in banking or merchandizing might form an opinion about what a man possessing given business qualifications ought to be able to earn, but this is not the question the jury is to determine. They are interested only in knowing what he did actually earn, or what his services were reasonably worth, prior to the time of his injury. In settling this question, they should consider not only his past earnings, or the fair value of services such as he was able to render, but his age, state of health, business habits, and manner of living. * * *

Another subject requires consideration. The verdict rendered by the jury gives the calculation upon which the enormous sum awarded to the plaintiff was based. From this it appears that the sum of $19,526.50 was given as the cost of an annuity of $1,750 per annum for 19 years. This calculation assumes (1) that the plaintiff's earning power was nearly twice as great as he had himself offered it for to the company whose president

and manager he was. It assumes (2) that he had a reasonable expectation of life for 19 years, being at the time of the trial about 53 years old. It assumes (3) that his earning power instead of steadily decreasing with increasing years, would hold up at its maximum to the very end of life. It assumes, in the fourth place, that he is entitled to recover, not only the present worth of his future earnings, as the jury has estimated them, but a sufficient sum to enable him to go out into the market, and purchase an annuity now, equal to his estimated earnings.

The first, second, and third of these are assumptions of fact. The fourth is an assumption of law, and is clearly wrong. When future payments are to be anticipated and capitalized in a verdict, the plaintiff is entitled only to their present worth. This is the exact equivalent of the anticipated sums. * * *

From what has been now said, it follows that substantially all of the assignments of error are sustained. The judgment is reversed and a *venire facias de novo* awarded.

STERRETT, C. J. dissents.

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(7) *Mental Anguish.*

CANNING *v.* WILLIAMSTOWN.

Massachusetts, 1848. 1 Cush. 451.

This was an action on the case to recover damages for an injury sustained by the plaintiff, in consequence of a defect in a bridge in the town of Williamstown.

Plaintiff was riding over a bridge in a light carriage drawn by two horses. When he reached the center of the bridge it gave way, and plaintiff fell upon rocks in the stream below and was injured in the face, and was put in considerable peril.

METCALF, J. The Rev. Sts. c. 25, § 22, provide, that if any person "shall receive any injury in his person," by reason of any defect or want of repair in a road, he may recover of the party, that is by law obliged to repair the road, the amount of damage sustained by such injury.

The argument for the defendants assumes that the plaintiff sustained no injury in his person, within the meaning of the statute, but merely incurred risk and peril, which caused fright and mental suffering. If such were the fact, the verdict would be contrary to law. But we must suppose that the jury, under

the instructions given to them, found that the plaintiff received an injury in his person—a bodily injury—and that they did not return their verdict for damages sustained by mere mental suffering caused by the risk and peril which he incurred. And though that bodily injury may have been very small, yet if it was a ground of action, within the statute, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages.

We are of opinion, that there was no error in the instructions; and we cannot presume that they were misunderstood or disregarded by the jury. *Exceptions overruled.*

VICTORIAN RYS. COM'RS *v.* COULTAS.

House of Lords, 1888. L. R. 13 App. Cas. 222.

Appeal from the Supreme Court of Victoria.

The plaintiffs, James and Mary Coultas, were driving over a level crossing and were in imminent peril of being killed by a train. On coming to the track of the railway they found the gates closed. The gateman opened the gate nearest them and they drove upon the track, when they saw an approaching train. James Coultas whipped up his horse, so that he managed to get the buggy across and through the farther gate, so that the train did not touch the buggy. It passed very close, however, and Mary Coultas fainted from fright. She suffered a severe illness and her nervous system was greatly shocked. There was no impact or physical damage. Judgment was rendered in favor of the plaintiffs in two several sums of £342 2s. and £400 and costs.

Sir Richard Couch. * * * According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident

caused by negligence had given a person a serious nervous shock, there might be a claim for damages on acount of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English courts in which, upon such facts as were proved in this case, damages were recovered. The decision of the Supreme Court of New York which he referred to in support of his contention was a case of palpable injury caused by a boy, who was frightened by the defendant's violence, seeking to escape from it, and is like the case of Sneesby v. Lancashire & Yorkshire Railway Company, 1 Q. B. D. 42. It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that "impact" is necessary, that the judgment should have been for the defendants. They will therefore humbly advise Her Majesty to reverse the judgment for the plaintiffs and to order judgment to be entered for the defendants, with the costs, etc.

LARSON *v.* CHASE.

Minnesota, 1891. 47 Minn. 307.

MITCHELL, J. This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and the defendant appealed. * * *

It is elementary that while the law, as a general rule only gives compensation for actual injury, yet, whenever the breach of a contract, or the invasion of a legal right is established the law infers some damage, and if no evidence is given of any particular amount of loss, it declares the right by awarding nominal

damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. Counsel cites the leading case of Lynch v. Knight, 9 H. L. Cas. 577-598. We think he is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest, of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental,—as, for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained

of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In Meagher v. Driscoll, 99 Mass. 281, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.

Order affirmed.

SLOANE *v.* SOUTHERN CALIFORNIA RY. CO.

California, 1896. 111 Cal. 668.

The plaintiff, Anna L. Sloane, purchased a ticket from the defendant railroad and duly surrendered it to the conductor, who gave her no check in return. She was subsequently put off the car by a second conductor, who demanded a ticket or payment of fare. No personal violence was used toward her, and she left the car by the direction of the second conductor. She had no money with her. She walked three miles, spent the night with her sister, borrowed some money and went on the next day to San Diego. The present action was brought to recover damages sustained by reason of defendant's wrongful acts.

HARRISON, J. Evidence was given at the trial tending to show that Mrs. Sloane had been previously subject to insomnia, and also to nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under any great mental

excitement; and that, by reason of the excitement caused by her exclusion from the car there had been a recurrence of insomnia and of these paroxysms.

Counsel for the appellant has discussed, in his brief, the want of liability on the part of the defendant for any damages for mental suffering, and has cited many authorities in support of the proposition that mere mental anxiety, unaccompanied with bodily injury or apprehended peril, does not afford a right of action. Although mental suffering alone will not support an action, yet it constitutes an aggravation of damages when it naturally ensues from the act complained of. 3 Sutherland on Damages—sec. 1245.

The real question presented by the objections and exception of the appellant is whether the subsequent nervous disturbance of the plaintiff was a suffering of the body or of the mind. The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright, or an exposure to imminent peril, has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected. Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves, or the entire nervous system, are thus affected, there is a physical injury thereby produced; and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect, through some action upon the mind.

This subject received a very careful and elaborate consideration in the case of Bell v. Railway Co., L. R. 26 Ir. 428. Mrs. Bell was a passenger upon one of the defendant's trains, and

by reason of the defendant's negligence in the management of its train suffered great fright, in consequence of which her health was seriously impaired. She had previously been a strong, healthy woman, but it was shown that, after this occurrence, she suffered from fright and nervous shock, and was troubled with insomnia, and that her health was seriously impaired. The jury were instructed that if, in their opinion, great fright was a reasonable and natural consequence of the circumstances in which the defendant by its negligence had placed her, and that she was actually put in fright by those circumstances, and if the injury to her health was, in their opinion, the reasonable and natural consequence of such great fright, and was actually occasioned thereby, the plaintiff was entitled to recover damages for such injury. It was objected to this instruction that, unless the fright was accompanied by physical injury, even though there might be a nervous shock occasioned by the fright, such damages would be too remote. In holding that this objection was not well founded, and that the nervous shock was to be considered as a bodily injury, the court held that, if such bodily injury might be a natural consequence of fright, it was an element of damage for which a recovery might be had, and, referring to the contention of the defendant, said:

It is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation cannot in law exist in the case of a similar act producing upon the same structures an effect which at a subsequent time—say a week, fortnight, or a month—must result without any intervening cause in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it, because the mortal effect is not produced contemporaneously with its administration." At the close of his opinion, Lord Chief Baron Palles says: "In conclusion I am of the opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a mat-

ter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence cause fright, and such fright in its turn so affect such structure as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such injury accompanied such negligence in point of time."

This case is quoted at great length and with approval in the eighth edition of Mr. Sedgwick's treatise on Damages, at section 860. Mr. Beven, in the recent edition of his work on Negligence (volume 1, pp. 77-81), also comments upon it with great approval. In Purcell v. Railroad Co., 48 Minn. 134, the defendant so negligently managed one of its cars that a collision with an approaching cable car seemed imminent, and was so nearly caused that the attendant confusion of ringing alarm bells and of passengers rushing out produced in the plaintiff, who was a passenger on the car, a sudden fright, which threw her into convulsions, and she being then pregnant, caused in her a miscarriage, and subsequent illness. The court held that the defendant's negligence was the proximate cause of the plaintiff's injury, and that it was liable therefor, even though the immediate result of the negligence was only fright, saying: "A mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system." (Citing authorities.)

The mental condition which superinduced the bodily harm in the foregoing cases was fright, but the character of the mental excitation by which the injury to the body is produced is immaterial. If it can be established that the bodily harm is the direct result of the condition, without any intervening cause, it must be held that the act which caused the condition set in motion the agencies by which the injury was produced, and is the proximate cause of such injury. Whether the indignity and humiliation suffered by Mrs. Sloane caused the nervous paroxysm, and the injury to her health from which she subsequently suffered, was a question of fact, to be determined by the jury. There was evidence before them tending to establish such fact, and if they were satisfied, from that evidence, that these results were directly traceable to that cause, and that her expulsion from the car had produced in her such a disturbance of her nervous system as resulted in these paroxysms, they were

authorized to include in their verdict whatever damage she had thus sustained. * * *

Van Fleet, J. and Garovtte, J. concurred.

Hearing in Bank denied.

MITCHELL *v.* ROCHESTER RY. CO.

New York, 1896. 151 N. Y. 107.

MARTIN, J. The facts in this case are few and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right, and came close to the plaintiff, so that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. Lehman v. Railroad Co., 47 Hun, 355; Commissioners v. Coultas, 13 App. Cas. 222; Ewing v. Railway Co., 147 Pa. 40

The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: Haile v. Railroad Co., 60 Fed. 557; Joch v. Dankwardt, 85 Ill.

331; Canning v. Inhabitants of Williamstown, 1 Cush. (Mass.) 451; Telegraph Co. v. Wood, 57 Fed. 471; Renner v. Canfield, 36 Minn. 90, Allsop v. Allsop, 5 Hurl. & N. 534; Johnson v. Wells, Fargo & Co., 6 Nev. 224; Wyman v. Leavitt, 71 Me. 227.

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it.

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.

Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an acidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the de-

fendant had no control, and hence her damages were too remote to justify a recovery in this action.

These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury. The orders of the General and Special Terms should be reversed, and the order of the Trial Term, granting a non-suit affirmed, with costs.

All concur, except HAIGHT, J., not sitting, and VANN, J., not voting.

Ordered accordingly.

WILKINSON *v.* DOWNTON.

L. R. 1897, 2 Q. B. 57.

WRIGHT, J. In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

In addition to these matters of substance there is a small claim of 1 s. 10½ d. for the cost of railway fares of persons sent by the plaintiff to Leytonstone in obedience to the pretended message. As to this 1 s. 10½ d. expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision of Pasley v. Freeman, 1789 3 T. R. 51. The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.

The real question is as to the 100 l., the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover

this as being damage caused by fraud, and therefore within the doctrine established by Pasley v. Freeman, *supra*, and Langridge v. Levy, 2 M. & W. 519. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote. Whether, as the majority of the House of Lords thought in Lynch v. Knight, 9 H. L. C. 577, at pp. 592, 596, the criterion is in asking what would be the natural effect on reasonable persons, or whether, as Lord Wensleydale thought 9 H. L. C. 577, at p. 600, the possible infirmities of human nature ought to be recognized, it seems to me that the

connection between the cause and the effect is sufficiently close and complete. It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an injuria to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action. One is the case of Victorian Railways Commissioners v. Coultas 13 App. Cas. 222, where it was held in the Privy Council that illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in the Court of Appeals in Pugh v. London, Brighton and South Coast Ry. Co., 1896 2 Q. B. 248, as open to question. It is inconsistent with a decision in the Court of Appeal in Ireland: see Bell v. Great Northern Ry. Co. of Ireland, 1890 26 L. R. Ir. 428, where the Irish Exchequer Division refused to follow it; and it has been disapproved in the Supreme Court of New York: see Pollock on Torts, 4th ed. p. 47 (n). Nor is it altogether in point, for there was not in that case any element of wilful wrong; nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case. On these grounds it seems to me that the case of Victorian Railways Commissioners v. Coultas, *supra*, is not an authority on which this case ought to be decided.

A more serious difficulty is the decision in Allsop v. Allsop, 5 H. & N. 534, which was approved by the House of Lords in Lynch v. Knight, 9 H. L. C. 577. In that case it was held by Pollock C. B., Martin, Bramwell, and Wilde BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person tells him that his physician has said that he

has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. I think, however, that it must be admitted that the present case is without precedent. Some English decisions—such as Jones v. Boyce, 1 Stark. 493; Wilkins v. Day, 12 Q. B. D. 110; Harris v. Nobbs, 3 Ex. D. 268;—are cited in Beven on Negligence as inconsistent with the decision in Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222. But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result, not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage. In Smith v. Johnson & Co., unreported, decided in January last, Bruce J. and I held that where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present.

There must be judgment for the plaintiff for 100 l. 1 s. 10½.

Judgment for plaintiff.

CHAPPELL *v.* ELLIS.

North Carolina, 1898. 123 N. C. 259.

DOUGLAS, J. This is an action to recover damages for the unlawful seizure and detention of personal property, and also for mental suffering caused thereby. The plaintiff * * * alleges "that she is old and infirm, having reached the age of 64 years, and has to depend upon her own labor and exertion for a support; and after the removal of the said property, * * * she had nothing upon which to live, and no home to shelter her body; that by the wrongful act of Thorpe and Ellis in taking from her the said property, contrary to the writ aforesaid, and without authority in law, and depriving her of the only means of support she then had, in her advanced age in life, she has suffered greatly in body and mind to her damage $500." * * *

The doctrine of mental suffering, or "mental anguish," as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance, contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come under the rule of exemplary punitive, or vindictive damages as they are variously denominated. * * * The question of exemplary damages does not appear to have been raised in the trial of the action, as no such issue or instruction was asked by either party. The theory of the plaintiff was the recovery of compensatory damages for mental anguish, under the rule laid down in Young v. Telegraph Co., 107 N. C. 370, and analogous cases. This rule cannot be extended to the case at bar. The plaintiff is entitled to recover all her actual damages sustained from the wrongful act of the defendants, including not only the value of the property not returned, but also whatever damages may have accrued from its seizure and detention. Furthermore, she may be allowed exemplary damages, in the discretion of the jury, if such circumstances of aggravation are shown as would bring her within the rule; but her case does not come within the doctrine of "mental anguish." It is true the two doctrines are somewhat similar, inasmuch as they recognize suffering other than physical or pecuniary; but they are so widely distinguished in their application that they are universally recognized as distinct principles, wherever they are recognized at all.

It is urged on behalf of the plaintiff that this case should be governed by the principles laid down in Cashion v. Telegraph Co., 123 N. C. 267. We see no resemblance. Our opinion in Cashion's Case was hinged on the solemn fact of death and the associations inseparable from the final severance of all earthly ties by an immortal spirit. The anguish of a mother bending over the body of her child, every lock of whose sunny hair is entwined with a heartstring, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig. We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway without shelter, and with but little to eat; but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different

course, but that great virtue is not enforceable in a court of law. * * *

The one universal law of nature is that all action, animate as well as inanimate, is the result of conflicting forces. * * * It is so with human action. Government itself is recognized as springing from the loss of personal liberty without license and of law without tyranny, but that its disturbance would lead to anarchy or despotism. * * *

For the error of his Honor in admitting evidence which tended simply to show the mental suffering of the plaintiff, disconnected with any allegation of malice or wantonness on the part of the defendants, a new trial must be granted. *New trial.*

BRAUN *v.* CRAVEN.

Illinois, 1898. 175 Ill. 401.

Defendant entered the house of plaintiff's sister, his tenant, to collect unpaid rent. He entered stealthily and unbidden. Plaintiff was sitting on the floor, and her sister was packing up her household goods. The defendant cried in a loud and angry voice: "I forbid you moving. If you attempt to move I will have a constable here in five minutes." Plaintiff averred that she became greatly frightened, and that in consequence of the nervous shock she became ill with chorea or St. Vitus dance. A verdict in her favor was rendered for $9,000. The Appellate Court reversed the judgment thereon, and plaintiff appealed therefrom.

PHILLIPS, J. * * * Appellant relies upon Bell v. Railroad Co., 26 L. R. Ir. 432, and Purcell v. Railway Co., 48 Minn. 134. Both of these cases fully sustain the contention of appellant that where sudden terror occasions a nervous shock, resulting from a negligent act, without impact or physical contact, by which the mind is affected, which may press on the health and affect the physical organization, a cause of action for negligence results. These cases have the approval of Mr. Beven in his work on Negligence (volume 1, pp. 76-84), and of Mr. Sedgwick, in his work on Damages (8th Ed. § 861). * * *

The courts in the above cases seem to have lost sight of the only safeguard against imposition in cases arising from negligence, and that is the elementary rule that, before a plaintiff can recover, he must show a damage naturally and reasonably

arising from the negligent act, and reasonably to be anticipated as a result. Two trains might be passing on a double-track road, one carrying passengers, and the other freight, and, at the moment when the engine of the freight train is immediately opposite a passenger car, it might become necessary to sound a whistle, whose effect might be to startle and greatly frighten a nervous person in the passenger car; and the fact that a whistle unexpectedly sounded would be calculated to startle and frighten a nervous person, and that such fright might produce a nervous shock that would cause physical injury, under the principle announced in the Purcell and Bell Cases, *supra*, would authorize a recovery. That could only be done, under the authority of those cases, by absolutely ignoring the principle that the injury might be reasonably anticipated as the result of the act, and, where it cannot be so anticipated, the result is too remote. These cases are discussed by Beven and Sedgwick without laying sufficient stress on this principle.

In our opinion, these authorities, so much relied on by counsel for appellant, are not only against the great weight of authority, but are not sustainable on principle. Appellee, in this case, was on the premises to collect rent, as he lawfully might, without any knowledge of the nervous condition of appellant; and it cannot be said that his manner, language, or gestures, or declared purpose of preventing the removal of the household effects of his tenants, were naturally and reasonably calculated to, or that it might be anticipated they would, produce the peculiar injury sustained by the appellant. It could not have been reasonably anticipated by the appellee that any injury therefrom could reasonably have resulted. The action is purely one of negligence; and, if appellee could be held liable under this evidence, then any person who might so speak or act as to cause a stranger of peculiar sensibility, passing by, to sustain a nervous shock productive of serious injury, might be held liable. Thus, one whose very existence was unknown to the party guilty of so speaking and acting would be given a right of recovery. Terror or fright, even if it results in a nervous shock which constitutes a physical injury, does not create a liability.

On the ground of public policy alone, having reference to the dangerous use to be made of such cause of action, we hold that a liability cannot exist consequent on mere fright or terror which

superinduces nervous shock. The Appellate Court held the language of the appellee, as disclosed by the evidence, was not such as could be held to constitute negligence, and that the injury sustained by appellant could not, according to common experience, be reasonably anticipated to result from such actions and language. We concur in that view, and the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

WATSON *v.* DILTS.

Iowa, 1902. 116 Iowa, 249.

SHERWIN, J. The petition alleges that the plaintiff is a married woman, and that on the 9th day of February, 1900, she resided, with her husband and child, on a farm remote from the traveled highway; that in the nighttime of said day, at about the hour of 11 o'clock, and after she, her husband, and her child had gone to bed, the defendant wrongfully, surreptitiously, and stealthily entered her said home, and went upstairs to the second story thereof, and, as the plaintiff then believed, to commit a felony; that the identity of the defendant was not known to her at the time she heard him enter the house and go upstairs, and that she called to her husband to follow him, which he did; that in her apprehension for her own, her child's, and her husband's life, from what appeared to her a threatened danger, she followed her husband up to the room where the defendant was found, and where she found him and her husband in what appeared to her to be an encounter, and an assault upon her husband; that she became greatly terrified thereat, and was attacked with a violent nervous chill of such severity that her nervous system completely gave way, and she became prostrated, and was confined to her bed with threatened neurosis, or paralysis, and suffered great mental and physical pain for nearly six weeks, during all of which time she was confined to her bed, and unable to attend to her household duties. The demurrer to the petition is based on the ground that the damages claimed are too remote and speculative, and that the plaintiff seeks recovery for fright and injuries resulting therefrom without any physical injury to her which caused the fright. The petition alleges physical injuries resulting from the fright caused by the defendant, and the demurrer thereto raises the question whether recovery may be had for physical injuries so caused.

Many cases have been before the courts in which the question of a recovery for mental pain alone, and for physical disability produced by fright, unaccompanied by physical impact, have been decided; and the decisions on these questions are in conflict, though it is probably true that the numerical weight of authority denies the right of action. But the cases so holding are not in harmony as to the reasons given for denying the right of action; some of them hold that the injury is not the proximate result of the alleged negligent or wrongful act, while others refuse a recovery for the reason that it is practically impossible to satisfactorily administer any other rule and serve the purposes of justice. Our attention has not, however, been called to any case in which the facts averred are precisely parallel to the facts in this case, and in no case to which we have been cited, and in no case which our own investigation has discovered, have we found facts alleged which so strongly condemn the unlimited application of the rule contended for by the appellee as do the facts pleaded in the case at bar. Nor could it be said, under such circumstances, that the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. "Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer." 1 Thomp. Neg. 156. It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization; consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequence which follows it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright. [Here the learned justice cites authorities.]

It is undoubtedly true that the door should not be thrown wide open for trumped-up claims on account of injuries resulting from fright, and we do not intend to so open it in this case. Each case must, of necessity, depend on its own facts.

We held in Lee v. City of Burlington, 113 Iowa, 356, that no recovery could be had for the death of a horse alleged to have been caused by fright, because death therefrom could not be anticipated, and hence it was not the proximate result of the defendant's negligence. In Mahoney v. Dankwart, 108 Iowa, 321, the question before us was not decided. That case was disposed of on the facts there presented, and was a case of simple negligence. The reasoning of the Massachusetts cases should not be applied to this case, for greater evil would result from a holding of no actionable wrong than can possibly follow the rule we announce. We do not concern ourselves with what the trial of this case may disclose, but hold a cause of action stated in the petition.

The demurrer should therefore have been overruled.

Reversed.

The cardinal principle in awarding damages is compensation. Pain is not susceptible of exact compensation by any pecuniary standard, but is an element to be considered. Musick v. Latrobe Borough, 184 Pa. 375.

In eminent domain, where private property is taken or injured by the construction of public works, the measure of damage is the difference in market value of the property before and after the construction. Shano v. Bridge Co. 189 Pa. 245.

Mental suffering cannot be allowed as an element of damages in an action for personal injuries, when it is not a part of the actual injury, but arises afterwards from regret, disappointment or anxiety. Linn v. Duquesne Borough, 204 Pa. 551. Here a married woman was permanently injured in her hands, causing her humiliation.

Where a saloon-keeper sues a gas company to recover for refusing to furnish gas, there can be no recovery for loss of profits, where no books of account or evidence of profits were produced. Miller v. Wilkes-Barre Gas Co. 206 Pa. 254.

But damages are not denied, because they are profits, where their loss necessarily follows the breach of contract. Wilson v. Wernwag, 66 Atl. Rep. 242.

Damages can not be estimated on the yield of crops not planted. Chicago v. Huenerbein, 85 Ill. 594. See also King v. Griffin, 87 S. W. Rep. 844.

On aggravation of pain, see Tice v. Munn, 94 N. Y. 621. "Juries are required to estimate, in the best way they can, what is a just recompense for pain suffered." Penn. R. R. v. Allen, 53 Pa. 276; Colo. Springs R. R. Co. v. Petit, 37 Colo. 326; Cotton Oil Co. v. Skipper 125 Ga. 368.

In case of loss of an eye and disfigurement there can be a recovery for humiliation and inconvenience. Hocking v. Windsor Spring Co. 131 Wis. 532. See too C. & M. E. R. R. v. Krempel, 103 Ill. App. 1.

If plaintiff be unlawfully excluded from public school, the disgrace may be an element of damage. Morrison v. Lawrence, 181 Mass. 127.

In case of breach of contract, actual damages only, as a rule, are allowed. Unruh v Taylor, 2 Pennewill, 42; Atchison R. R. v. Thomas, 70 Kan. 409; Talbott v. W. Va. C. & P. Ry. Co. 42 W. Va. 560; see also Chicago, St. L. R. R. v. Butler, 10 Ind. App. 244.

A father is entitled to be paid for his loss of time resulting from the negligent injury of his minor son. Brinkman v. Cotton Oil Co. 118 La. 835.

Damages for mental anguish are allowed even in cases of trespass on land, if done insultingly. Meagher v. Driscoll, 99 Mass. 281.

Damages are allowed when, in the contemplation of the parties, the breach would probably cause anguish and distress of mind. Renihan v. Wright, 125 Ind. 536.

See Beaulieu v. Great Northern Ry. Co. 114 N. W. Rep. 353, for a review and discussion of all the leading cases on mental anguish in the Supreme Court of Minnesota in December, 1907.

Loss of profits which are reasonably certain may be made the basis of recovery in suits for breach of contract. Anvil Mining Co. v. Humble, 153 U. S. 549. See too Bratt v. Swift, 99 Wis. 579. For prospective profits, see Snow v. Pulitzer, 142 N. Y. 263.

For aggravation of disease, hastened through defendant's negligence, see Campbell v. Los Angeles Traction Co. 137 Cal. 565; and City of Rock Island v. Starkey, 189 Ill. 527.

For expenses as an element of damage see Mine Supply Co. v. Columbia Mining Co. 48 Oregon, 391; also physician's fee, Washington & G. R. Co. v. Patterson, 9 App. D. C. 423.

Loss of fees in an office usurped by defendant can be recovered. Palmer v. Derby, 64 Ohio, 520. So also a husband can recover for loss of his wife's services, assistance, companionship and society. Hutchels v. Cedar Rapids R. R. Co. 128 Ia. 279.

For loss or diminution of earning power see Maryland D. & V. Ry. Co. v. Brown, 71 Otl. Rep. 1005; and Lewis v. Northern Pacific Ry. Co. 36 Mont. 207; Glenn v. Phila. & W. C. T. Co. 206 Pa. 135.

At common law mere injury to the feelings or affections did not constitute an independent basis for the recovery of damages. There must be an element of injury or discomfort, resulting from actual or threatened force. Summerfield v. Western U. Tel. Co. 87 Wis. 1. The message here was "Mother is dying. Come immediately."

Nor can there be a recovery for prospective mental anguish. Ill. C. R. R. v. Cole, 165 Ill. 334.

The jury may consider the mortification and shame which a lady endures because obliged to use a crutch; but the jury may not consider that plaintiff was engaged to be married and the marriage had to be postponed. Beach v. Rapid Ry. Co. 119 Mich. 512.

Worry in case of an intelligent being can not be overlooked as an element of damages. WOODWARD, J., in Webb v. Yonkers R. R. 51 App. Div. N. Y. 194. See also Kennon v. Gilmer, 131 U. S. 22.

Humiliation felt by a married woman because her hands were permanently crippled cannot be considered by the jury. Linn v. Duquesne Boro. 204 Pa. 551.

Mental suffering, past and future, found to be the necessary consequence of the loss of a leg may be considered. McDermott v. Severe, 202 U. S. 600.

In Simone v. R. I. Co. 28 R. I. 186, 1907, Mr. Justice PARKHURST examines all the authorities on fright as an element of damages, and reaches the conclusion that there can be no recovery on this ground. To the same effect is the decision of RUGG, J., in Sullivan v. Old Colony R. R. Co. 197 Mass. 512, 1908.

Privation and inconvenience are recognized as elements of damage. Smith v. Borough of East Mauch Chunk, 3 Penn. Super. Ct. 495.

So, too, is the loss of power to bear children. Normile v. Wheeling Traction Co. 57 W. Va. 132.

Profits which are the direct and immediate fruits of a contract can be recovered as damages. Howe Machine Co. v. Bryson, 44 Ia. 159.

"In an action by a parent to recover for loss occasioned by the injury to his child, the measure of damages is the pecuniary loss to him." Woeckner v. Erie Electric Motor Co. 182 Pa. 182. There can be no recovery for nursing by members of plaintiff's family; this is the ordinary office of affection. *Ib.*

If there be a contract to furnish power for a mill, the measure of damages for failure to perform is the difference in rental value of the mill with the power and without it. Witherbee v. Meyer, 155 N. Y. 446.

Profits are to be distinguished from earnings, in case of personal services of a boarding-house keeper. Wallace v. Penn. R. R. 195 Pa. 127.

The jury can consider the reasonable profits of a traveling theatrical troupe known as the "Eight Bells Company." Ill. I. C. R. R. v. Byrne, 205 Ill. 9.

The jury may consider the average annual profit of plaintiff's business for ten years before his injury in estimating his earning power. Heer v. Warren-Scharf Asphalt Paving Co. 118 Wis. 57.

But the merely probable loss of profits of an idle mill cannot be recovered. McNeill v. Crucible Steel Co. 207 Penn. 493.

The earning power of plaintiff, his health, industry, profits and capital can be shown. Simpson v. Penn. R. R. 210 Penn. 101. As to earning power, see also Wilkinson v. North East Boro, 215 Pa. 486, and Melone v. Sierra R. R. Co. 151 Cal. 113.

In Schenkel v. Pittsburg and B. Traction Co. 194 Pa. 182, the court charged: "While you cannot undertake to pay her for the injury, for the pain and suffering, you have a right to take into consideration the fact that her future life will be more or less affected by the pain and suffering incident to this action, and for that she ought to have some allowance." Held, that this did not permit the jury to give damages for pain and suffering "as a separate and distinct item."

The law admits of compensation for future as well as for past pain and suffering. Wallace v. Penn. R. R. 219 Pa. 327.

Every item and element of damage claimed by plaintiff must be shown by a preponderance of evidence. Physicians' bills must thus be proved. West Chicago St. R. R. v. Carr, 170 Ill. 484.

There may be a recovery for medical fees incurred though not paid. Donk Bros. C. & C. Co. v. Thil, 228 Ill. 233.

4. *Exemplary Damages.*

MEREST *v.* HARVEY.

Common Pleas, 1814. 5 Taunt. 442.

Trespass for forcibly breaking and entering the plaintiff's close, called Brandon Road Breck, part of Longford Field, and with feet in walking, and with dogs, treading down and spoiling the plaintiff's grass, and with dogs and guns searching, hunting, and beating for game there, and doing other wrongs. The cause was tried before Heath, J., at the Norfolk spring assizes, 1814. The evidence was, that in September the plaintiff, a gentleman of fortune, was shooting on his own manor and estate, in a common field contiguous to the highway, when the defendant, a banker, a magistrate, and a Member of Parliament, who had dined and drank freely after taking the same diversion of shooting, passed along the road in his carriage, and quitting it, went up to the plaintiff and told him he would join his party, which the plaintiff positively declined, inquired his name, and gave him notice not to sport on the plaintiff's land; but the defendant declared with an oath that he would shoot, and accordingly fired several times, upon the plaintiff's land, at the birds which the plaintiff found, proposed to borrow some shot of the plaintiff, when he had exhausted his own, and used very intemperate language, threatening, in his capacity of a magistrate, to commit the plaintiff, and defying him to bring any action. The witness described his conduct as being that of a drunken or insane person. The plaintiff conducted himself with the utmost coolness and propriety. A special jury found a verdict for the plaintiff for the whole damages in the declaration, 500 l.; which verdict

Blosset, Sergt., now moved to set aside for excess; for he said, the defendant's conduct must have proceeded from intoxication or insanity, as it was described by the witnesses; the jury seemed to have considered, not what they ought to give as a compensation for the injury sustained, but what they, as lords of manors in a sporting county, where the jealousy of preserving the game was carried to an excess, should like to receive in similar circumstances.

Gibbs, C.J. I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what

is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What would be said to a person in a low situation of life, who should behave himself in this manner? I do not know upon what principle we can grant a rule in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window and that a man intrudes and walks up and down before the window of his house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, "Here is a halfpenny for you, which is the full extent of all the mischief I have done?" Would that be a compensation? I cannot say that it would be.

HEATH, J. I remember a case where a jury gave 500 l. damages for merely knocking a man's hat off; and the court refused a new trial. There was not one country gentleman in a hundred, who would have behaved with the laudable and dignified coolness which this plaintiff did. It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages. *Rule refused.*

GODDARD *v.* GRAND TRUNK RAILWAY.

Maine, 1869. 57 Me. 202.

Motion to set aside verdict as excessive.

WALTON, J. It appears in evidence that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and, shaking it violently, told him not to yip, if he did he would spot him, that

he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman, who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried, and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct. * * * [Here the learned justice cites authorities.]

What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago. * * * [Here the learned justice cites Lord Camden.]

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own wilful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty; and

what these same courts would have done if a case of such gross and outrageous insult had been before them as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation, or the malice of the servant and the malice of the corporation, or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence, called a corporation. And yet under cover of its name and authority there is, in fact, as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in stocks,—since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damage is more beneficial in its application to them than in its application to

natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and band-boxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations; and that is, the pocket of the moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the wilful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country. * * * On the whole, we cannot doubt that it is best for all concerned that this verdict be allowed to stand.

Motion and exceptions overruled.

TAPLEY, J., did not concur on the question of damages.

LAKE SHORE & M. S. RAILWAY *v.* PRENTICE.

Supreme Court of the United States, 1893. 147 U. S. 101.

MR. JUSTICE GRAY after stating the case delivered the opinion of the court. The only exceptions taken to the instructions at the trial, which have been argued in this court, are to those on the subject of punitive damages.

The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive

or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger.

This question, like others affecting the liability of a railroad corporation as a common carrier of goods or passengers,—such as its right to contract for exemption from responsibility for its own negligence, or its liability beyond its own line, or its liability to one of its servants for the act of another person in its employment,—is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decision of the courts of the several States. Railroad Co. v. Lockwood, 17 Wall. 357, 368; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443; Myrick v. Railroad Co., 107 U. S. 102, 109; Hough v. Railway Co., 100 U. S. 213, 226.

The most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution is to be found in the remarks of Chief Justice Pratt (afterwards Lord Camden) in one of the actions against the king's messengers for trespass and imprisonment, under general warrants of the Secretary of State, in which, the plaintiff's counsel having asserted, and the defendant's counsel having denied, the right to recover "exemplary damages," the Chief Justice instructed the jury as follows: "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Wilkes v. Wood, Lofft, 1, 18, 19, 19 Howell, St. T. 1153, 1167. See, also, Huckle v. Money, 2 Wils. 205, 207; Sayer, Dam. 218, 221. The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending in like manner, is here clearly recognized.

In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called "smart money," if the defendant has acted wantonly, or oppressively, or with such

malice as implies a spirit of mischief or criminal indifference to civil obligations; but such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559; Day v. Woodworth, 13 How. 363, 371; Railroad Co. v. Quigley, 21 How. 202, 213, 214; Railway Co. v. Arms, 91 U. S. 489, 493, 495; Railway Co. v. Humes, 115 U. S. 512, 521; Barry v. Edmunds, 116 U. S. 550, 562, 563; Railway Co. v. Harris, 122 U. S. 597, 609, 610; Railway Co. v. Beckwith, 129 U. S. 26, 36.

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of The Amiable Nancy, 3 Wheat. 546. * * * The learned justice here reviews the case of The Amiable Nancy and continues as follows:

The rule thus laid down is not peculiar to courts of admiralty; for, as stated by the same eminent judge two years later, those courts proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by the misconduct of the other party. Manufacturing Co. v. Fiske, 2 Mason, 119, 121. In Keene v. Lizardi, 8 La. 26, 33, Judge Martin said: "It is true, juries sometimes very properly give what is called 'smart money.' They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent." To the same effect are The State Rights, Crabbe, 42, 47, 48; The Golden Gate, McAll. 104; Wardrobe v. Stage Co., 7 Cal. 118; Boulard v. Calhoun, 13 La Ann. 445; Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Grund v. Van Vleck, 69 Ill. 478, 481; Becker v. *Dupree*, 75 Ill. 167; Rosenkrans v. Barker, 115 Ill. 331; Kirk-

sey v. Jones, 7 Ala. 622, 629; Pollock v. Gantt, 69 Ala. 373, 379; Eviston v. Cramer, 57 Wis. 570; Haines v. Schultz, 50 N. J. Law, 481; McCarthy v. De Armit, 99 Pa. St. 63, 72; Clark v. Newsam, 1 Exch. 131, 140; Clissold v. Machell, 26 Upper Canada Q. B. 422. * * *

No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. Railroad Co. v. Quigley, Railway Co. v. Arms, and Railway Co. v. Harris, above cited; Caldwell v. Steamboat Co., 47 N. Y. 282; Bell v. Railway Co., 10 C. B.. (N. S.) 287, 4 Law T. (N. S.) 293.

Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. Kennon v. Gilmer, 131 U. S. 22; Meagher v. Driscoll, 99 Mass. 281, 285; Smith v. Holcomb, Id. 552; Hawes v. Knowles, 114 Mass. 518; Campbell v. Car Co., 42 Fed. Rep. 484. * * *

The law applicable to this case has been found nowhere better stated than by Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict but excepted to an instruction to the jury that "punitive or vindictive damages, or smart money, were not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed." This instruction was held to be right, for the following reasons: "In cases where punitive or exemplary damages have been assessed, it has been done, upon evidence of such wilfulness, recklessness, or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment, and teach the lesson of caution to

prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty." "Where the proof does not implicate the principal and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant." Hagan v. Railroad Co., 3 R. I. 88, 91.

The like view was expressed by the Court of Appeals of New York in an action brought against a railroad corporation by a passenger for injuries suffered by the neglect of a switchman, who was intoxicated at the time of the accident. It was held that evidence that the switchman was a man of intemperate habits, which was known to the agent of the company having the power to employ and discharge him and other subordinates, was competent to support a claim for exemplary damages, but that a direction to the jury in general terms that in awarding damages they might add to full compensation for the injury "such sum for exemplary damages as the case calls for, depending in a great measure, of course, upon the conduct of the defendant," entitled the defendant to a new trial; and Chief Justice Church, delivering the unanimous judgment of the court, stated the rule as follows: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless, and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken en-

gineer or switchman, or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard, or to graduate the amount of such damages by their views of the propriety of the conduct of the defendant, unless such conduct is of the character before specified." Cleghorn v. Railroad Co., 56 N. Y. 44, 47, 48.

Similar decisions denying upon like grounds the liability of railroad companies and other corporations, sought to be charged with punitive damages for the wanton or oppressive acts of their agents or servants, not participated in or ratified by the corporation, have been made by the courts of New Jersey, Pennsylvania, Delaware, Michigan, Wisconsin, California, Louisiana, Alabama, Texas, and West Virginia.

It must be admitted that there is a wide divergence in the decisions of the State courts upon this question, and that corporations have been held liable for such damages under similar circumstances in New Hampshire, in Maine, and in many of the Western and Southern States. But of the three leading cases on that side of the question, Hopkins v. Railroad Co., 36 N. H. 9, can hardly be reconciled with the later decisions in Fay v. Parker, 53 N. H. 342, and Bixby v. Dunlap, 56 N. H. 456; and in Goddard v. Railway Co., 57 Maine, 202, 228, and Railway Co. v. Dunn, 19 Ohio St. 162, 590, there were strong dissenting opinions. In many, if not most, of the other cases, either corporations were put upon different grounds in this respect from other principals, or else the distinction between imputing to the corporation such wrongful act and intent as would render it liable to make compensation to the person injured, and imputing to the corporation the intent necessary to be established in order to subject it to examplary damages by way of punishment, was overlooked or disregarded.

Most of the cases on both sides of the question, not specifically cited above, are collected in 1 Sedgwick on Damages (8th ed.) § 380.

In the case at bar, the plaintiff does not appear to have contended at the trial, or to have introduced any evidence tending

to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved, or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages; but the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury, and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the Circuit Court, with direction to set aside the verdict, and to order a new trial.

MR. JUSTICE FIELD, MR. JUSTICE HARLAND and MR. JUSTICE LAMAR took no part in this decision.

MAISENBACKER *v.* THE SOCIETY CONCORDIA.

Connecticut, 1899. 71 Conn. 369.

Action to recover damages for assault and battery and wrongful ejection of plaintiff from a dance hall. Verdict for plaintiff. Defendant appeals.

HALL, J. The complaint alleges, in substance, that the plaintiff, having contracted with and paid the defendant for the privilege of dancing at a certain ball, was, by the forcible acts of the defendant's agents, prevented from exercising her said right, and was thereby caused pain and damage. The trial court correctly charged the jury that the complaint described two causes of action,—one for personal injury, and the other for a breach of contract. Under the averments of the complaint, the plaintiff would have been entitled to a verdict upon proof either that she was forcibly prevented from dancing, as alleged, or that the defendant's agents, without using force, unlawfully deprived her of the privilege which was granted to her by her contract with the defendant. We have no occasion to decide whether these two causes of action should have been stated in separate counts. Several causes of action may be stated in a single count, when such causes of action are not separate and distinct from each *other*; that is, separable from each other "by some distinct line of demarkation." Craft Refrigerating Mach. Co. v. Quinnipiac

Brewing Co., 63 Conn. 563. The defendant, not having demurred to the complaint, has waived the question whether the two causes of action were improperly joined in one count. Practice Book, p. 17, rule 4, § 13.

Apparently no question was made at the trial but that under the pleadings the plaintiff, upon proof that the defendant's agent forcibly prevented her from dancing, became entitled to a verdict for a sum sufficient to indemnify her for the actual injuries she sustained, and which were the direct and natural consequences of the wrongful act complained of. The complaint alleges that, in consequence of the assault, the plaintiff was deprived of the privileges of the ball, that she suffered physical and mental pain and anguish, and lost her earnings in the trade at which she had been employed. The court instructed the jury that, in determining the amount of compensatory damages to be awarded the plaintiff, they might take into consideration the indignity she had suffered by an assault in so public a place, the mental as well as the physical suffering which it caused her, and such loss as had been proved she had thereby sustained from inability to work at her trade. "All the attending acts and circumstances which accompany and give character to the assault may be given in evidence to enhance the damages." Brzezinski v. Tierney, 60 Conn. 62. Mental as well as physical suffering, when properly alleged, may be proved as an element of actual damage, and as naturally and directly resulting from an assault of the character described in the complaint. Gibney v. Lewis, 68 Conn. 393; Seger v. Town of Barkhamsted, 22 Conn. 298; Masters v. Town of Warren, 27 Conn. 299. The defendant has no cause to complain of the charge of the court with reference to the elements which go to make up compensatory damages.

The complaint alleges that the defendant's agent, in committing the assault, "addressed the plaintiff in loud, threatening, and insulting language," and that the assault upon the plaintiff was "committed in a gross, wanton, and reckless manner, and with intent to" injure the plaintiff. The defendant, in effect, requested the court to charge the jury that the defendant society could not, upon the proof presented, be held liable in exemplary damages. The court did not comply with this resquest, but instructed the jury that, in case they found that a battery had been inflicted upon the plaintiff by the defendant's agent, "want-

only, maliciously, or in wanton disregard of the plaintiff's rights," they might add, to that sum which they should find sufficient to compensate the plaintiff for her injuries, "a sum as exemplary or punitive damages," and might award her as punitive damages such sum as the jury, from their "knowledge of the course of business in the courts of law in this state," should find "to be her expenses in conducting this trial," less the taxable costs which she would recover. The jury returned a verdict for the plaintiff for $300. We have not the evidence in the case before us, but from the finding of facts, and from the charge of the court stating the claims of the parties as to the character and extent of the plaintiff's injuries, we think the jury may, under such instruction, have included in their verdict, as an element of damages, the expenses incurred by the plaintiff in conducting her trial, less the taxable costs; and, unless this is a case in which such expenses could lawfully be recovered, the charge of the court was incorrect, and a new trial should be granted.

That a plaintiff may, in an action for an assault and battery, and in certain other actions of tort, recover certain damages which are not "compensatory," within the technical and legal meaning of that word, but which are awarded with the view of punishing the defendant for this wrongful act, has been settled in this state beyond question by a large number of decisions, extending from Linsley v. Bushnell, 15 Conn. 225, to Gibney v. Lewis, 68 Conn. 392. The cases in which punitive damages may be awarded are only those actions of tort "founded on the malicious or wanton misconduct of the defendant," or upon "such culpable neglect of the defendant" as is "tantamount to malicious or wanton misconduct." St. Peter's Church v. Beach, 26 Conn. 355; Welch v. Durand, 36 Conn. 182; Burr v. Town of Plymouth, 48 Conn. 460. And private corporations, as well as individuals, may for their own acts become liable in punitive damages. Sedg. Dam. § 379; Merrills v. Manufacturing Co., 10 Conn. 384; Murphy v. Railroad Co., 29 Conn. 496. The expenses of litigation are not an element of the damages termed in law "actual" or "compensatory" damages. "They are not the natural and proximate consequence of the wrongful act," and they can only be considered by the jury in those cases in which exemplary damages may be awarded. St. Peter's Church v. Beach, *supra;* Platt v. Brown, 30 Conn. 336; Mason v. Hawes, 52

Conn. 12; Gibney v. Lewis, *supra*. Such expenses in excess of taxable costs, in cases in which they may be considered, limit the amount of punitive damages which can be awarded. Wilson v. Granby, 47 Conn. 59; Burr v. Town of Plymouth, *supra*. In cases where they may be considered it is not usual to prove the expenses of litigation actually incurred, but the court may admit relevant evidence for that purpose. Bennett v. Gibbons, 55 Conn. 450.

The case before us, as shown by the record, is not one in which the defendant society could be held liable in punitive damages. The defendant is a corporation. The alleged assault was committed by a floor manager "appointed by the defendant to have the regulation and charge of the dancing" at a ball given by the defendant. The assault which the court instructed the jury would, if found to have been committed, and to have been inflicted wantonly and maliciously, entitle the plaintiff to exemplary damages, was the putting of his hand by one of the floor managers upon the plaintiff's shoulder, "rudely, insolently, or angrily," and while she was upon the ballroom floor, "at the same time telling her that she could not dance there, and that she was not a fit person to be there." If these facts are sufficient to show that the act of the agent was malicious or wanton, they do not prove that the principal in any way participated in such malicious or wanton misconduct. As its agent was acting within the scope of his employment, the law compels the defendant to compensate the plaintiff for the injuries she has sustained from the wrongful acts of the agent, but it does not punish the defendant for the malicious purpose or intent which prompted the agent's conduct. To render the principal liable in exemplary damages for the acts of his agent in the course of his employment, but done with such malicious intent, some misconduct of the former beyond that which the law implies from the mere relation of principal and agent must be shown. It is not claimed that the defendant society directed the floor manager to remove the plaintiff, or to act towards any person in the manner in which it is alleged he did, or that the defendant has since adopted or approved of his action. In Cleghorn v. Railroad Co., 56 N. Y. 44, Chief Justice Church, in delivering the opinion of the court, says: "For injuries by the negligence of a servant while engaged in the business of the master within the scope of his employment, the latter is liable for compensatory damages;

but for such negligence, however, gross or culpable, he is not liable to be punished in punitive damages, unless he is also chargeable with gross misconduct." In the case of Railway Co. v. Prentice, 147 U. S. 101, in which this question is very fully discussed, and the decisions in both the federal and state courts upon this subject reviewed, Mr. Justice Gray, speaking for the court, laid down the rule, as deducible from the authorities, that "guilty intention upon the part of the defendant is required in order to charge him with exemplary or punitive damages." "Exemplary or punitive damages," said he, "being awarded, not by way of compensation, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent upon the part of the agent." In 1 Sedg. Dam. (8th Ed.) §§ 378, 380, the author, after citing very fully the conflicting authorities in different jurisdictions upon this question, says: "It is the better opinion that no exemplary damages can be had against a principal for the tort of an agent or servant, unless the defendant expressly authorized the act as it was performed, or approved it, or was grossly negligent in hiring the agent or servant." In the case at bar, as it appears by the record before us, we think compensation for the injury suffered was the full measure of the defendant's responsibility, and that there was error in charging the jury that they might award the plaintiff as punitive damages the expenses of trial in excess of taxable costs, and in not charging upon the subject of punitive damages, as requested by defendant. Error, and new trial. The other judges concurred.

KRUG *v.* PITASS.

New York, 1900. 162 N. Y. 154.

This is an action to recover damages alleged to have been caused by the publication of an article concerning the plaintiff in a newspaper published in the Polish language at the city of Buffalo, known as the "Pole in America." The defendant Pitass was the proprietor of said newspaper, the defendant Slisz the editor, and the article in question was a communication

signed by the other defendant, Smeja. The jury rendered a verdict in favor of the plaintiff for $6,250, and, the judgment entered thereon having been affirmed in the Appellate Division by a divided vote, the defendants appeal to this court.

VANN, J. The article in question, according to either translation, was libelous upon its face because it charged the plaintiff with a want of professional ability and integrity, and thus endangered the gain derived from his vocation. Cruikshank v. Gordon, 118 N. Y. 178; Mattice v. Wilcox, 147 N. Y. 624; Flood on Libel & Slander, 114. Referring to him as a physician, it called him a blockhead or fool, and appealed to all the Poles in Buffalo not to intrust themselves or their families to his professional care when he so hated them that he would not help them if he could. * * * The article was actionable without proof of any damages, for the law imputes malice to the defendants, and presumes that damages were sustained by the plaintiff from the bare act of publication. (Citing authorities.)

While the plaintiff was thus entitled to recover on account of implied malice, his damages, without further proof, would be limited to such an amount as would fairly compensate him for the actual injury sustained. In order to recover punitive damages also, it was necessary for him to furnish evidence of express malice, or malice in fact, as distinguished from malice implied. Implied malice, in an action for libel consists in publishing, without justifiable cause, that which is injurious to the character of another. It is a presumption drawn by the law from the simple fact of publication. Express malice consists in such a publication from ill will, or some wrongful motive, implying a willingness or intent to injure, in addition to the intent to do the unlawful act. It requires affirmative proof, beyond the act of publishing, indicating ill feeling, or such want of feeling as to impute a bad motive. It does not become an issue, when the article is libelous on its face, unless punitive damages are claimed.

In order to establish express malice, the plaintiff was allowed to show, as against all the defendants, that several years prior to the publication the defendant Pitass had made remarks about him expressing contempt and ill will. There was no connection between these remarks and the other defendants, who neither heard them nor ever heard of them, so far as appears. It is undisputed that Pitass knew nothing about the article until some time after it had been published. He did not, directly or indi-

rectly, cause or consent to its publication. He was liable only because he owned the newspaper, and was responsible for the acts of his agents in publishing it. His previous statements did not cause the publication, nor have any effect upon it. Between those statements and the fact of publication there was no connection, and no relation of cause and effect. They did not enter into, or become part of, or have any bearing upon the wrong of which the plaintiff complains. As the article would have been published if they had not been made, they were immaterial, for they did not touch the wrongful act, and could not aggravate the damages.

Punitive damages, which are in excess of the actual loss, are allowed where the wrong is aggravated by evil motives in order to punish the wrongdoer for his misconduct, and furnish a wholesome example. As was said by the Supreme Court of the United States in an important case: "Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act. The work implies that the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations." Railroad Co. v. Quigley, 62 U. S. 202.

Did Pitass inflict the injury upon the plaintiff maliciously, when he knew nothing about it at the time it was done, and was only liable as owner of the newspaper? Did he, "in a spirit of mischief," conceive the act done by his agent without his knowledge? Could his malicious remarks, made in 1890, leap forward, and, without knowledge or action on his part, become blended with the act of his agent in 1894? Did his agent, the editor, conceive the act "in a spirit of mischief," which never entered his own mind, but existed at a remote period in the mind of another? Did the writer of the article act under the influence of words neither spoken in his presence nor communicated to him in any way?

In an action for a tort there can be no recovery of punitive damages for general malice, but only for such particular malice as existed when the tortious act was done, and which had some influence in causing it to be done. * * * Moreover, the malice of one defendant cannot be imputed to another without con-

necting proof. "If two be sued, the motive of one must not be allowed to aggravate the damages against the other. Nor should the improper motive of an agent be matter of aggravation against his principal." Bigelow's Odgers on Libel and Slander, 296. * * *

Neither the author nor editor was a party to the malice of the publisher, and his malice did no harm, because it had no effect upon the result. While he was responsible for their acts, they were not responsible for his motives, of which they had no knowledge. He was not responsible for his motives in connection with their acts, because there was no connection. The malice proved in this case did not cause the conduct complained of. The one guilty of malice did not commit the wrong, except through an agent, who knew nothing about the malicious feelings of his principal. The principal was not liable for general malice, but only for such particular malice as was connected with the publication. The agent was not liable for the general malice of his principal, of which he knew nothing, and which had no connection with the wrong done. The writer of the article was not liable for the malice of another, of which he had never heard, and which had no influence upon the wrongful act. Yet the general malice of one out of three defendants, although it had no connection with the wrong, has, as it must be presumed, entered into the verdict of sixty-two hundred and fifty dollars against all, in violation of the rights of each.

As the malice proved neither caused nor prompted the publication of the libel, the judgment must be reversed and a new trial granted, with costs to abide the event. All concur.

Judgment reversed, &c.

HAYWOOD *v.* HAMM.

Connecticut, 1904. 77 Conn. 158.

Action to recover damages for injury by runaway horse.

BALDWIN, J. The plaintiff, while driving upon a city street, was struck and injured by a runaway horse owned by the defendant. In his complaint he alleged that the horse had been carelessly left unhitched, though he had, and the defendant knew he had, a habit of running away. To prove this habit, he was allowed to introduce evidence of declarations made shortly after the accident by the defendant's son, who had been in charge of

the horse that day, and had left him standing in the street by the curbstone just before he ran away. In this there was error. One authorized to drive another's horse is not thereby made his agent for the purpose of making admissions as to the habits of the animal. Nor were the declarations part of the *res gestæ* pertaining to the accident. They were subsequent in time, and narrative in character.

The defendant was called as a witness by the plaintiff, and testified that his son was in charge of the horse on the day in question, and was using it to attend to some of his own business, and probably some of his (the father's), also. This was correctly held to be sufficient *prima facie* proof of agency. Hoyt v. Danbury, 69 Conn. 341.

The trial court properly instructed the jury that, to justify a verdict for the plaintiff, it was unnecessary for him to prove that the horse had a habit of running away, which was known to the defendant. It was enough if, whatever its disposition and habits, it had been left in the street, unhitched, under circumstances which, in the opinion of the jury, all things considered, made that a negligent act on the part of one whom the defendant had made his agent in the matter. This was substantially what the jury were told.

They were, however, also instructed that if they were satisfied that the horse had the habit of running away, and the defendant knew it, and it was negligently left unhitched or insecurely fastened by the defendant's agent, exemplary damages could be awarded. This was erroneous. Exemplary damages are given as a punishment for an offense, and only against those who participated in the offense. The tort charged in the complaint was that of the agent, in leaving the horse unhitched. This act the defendant never expressly authorized, approved, or ratified. Nor did he do or say anything, so far as appears, which could have led the agent to suppose that it was authorized. He therefore committed no offense which could be the proper subject of such a punishment. Maisenbacker v. Society Concordia, 71 Conn. 369.

The verdict was one which, under the charge, the jury would well return, and so the motion to set it aside was properly overruled.

There is error, and a new trial is ordered. The other judges concurred.

For wanton and intentional violation of the rights of others, or under circumstances of aggravation or oppression, as in wantonly destroying shade-trees, exemplary damages may be recovered. Sperry v. Seidel, 218 Pa. 16; Huling v. Henderson 161 Pa. 553.

Where a newspaper article is libellous *per se*, the law presumes malice, and may award exemplary damages. Tingley v. Times-Mirror Co. 151 Cal. 1.

See also, for decisions on exemplary damages, Scott v. Donald, 165 U. S. 58; Boydan v. Haberstumpf, 129 Mich. 140; Bullock v. D. L. & W. R. R. Co. 61 N. J. L. 550; Palmer v. Phila. B. & W. R. R. Co. 218 Pa. 114; Haviland v. Chase, 116 Mich. 216; Southern R. R. Co. v. Jordan, 129 Ga. 665; Baxter v. Campbell, 17 S. D. 475; Stroud v. Smith (Penn. 1900), 45 Atl. Rep. 329; Wells v. Boston & M. R. R. Co. (Vermont, 1909), 71 Atl. Rep. 1103.

Exemplary damages have been regarded by some courts as wrong in theory. See Murphy v. Hobbs, 7 Col., 541. Still they are allowed in certain cases of tort. M'Carthy v. Niskern, 22 Minn. 90. They are in the nature of punishment. Milwaukee R. R. v. Arms, 91 U. S. 489; Voltz v. Blackmar, 64 N. Y. 444; Johnson v. Allen, 100 N. C. 131.

Some courts hold that such damages are awarded, not as punishment, but as compensation. Fay v. Parker, 53 N. H. 342; Bixby v. Dunlap, 56 N. H. 456. The doctrine is discussed generally in Wilson v. Bowen, 64 Mich. 141; Hawes v. Knowles, 114 Mass. 518; and in Bank of Commerce v. Goos, 23 L. R. A. 190.

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5. *Excessive Damages.*

HUCKLE *v.* MONEY.

Common Pleas, 1763. 2 Wilson, 205.

PRATT, Lord Chief Justice. In all motions for new trials, it is as absolutely necessary for the courts to enter into the nature of the cause, the evidence, facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measuse of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, &c., the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages; the few cases to be found in the books of new trials for torts show that

courts of justice have most commonly set their faces against them; and the courts interfering in these cases would be laying aside juries; before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages.

I shall now state the nature of this case, as it appeared upon the evidence at the trial; a warrant was granted by Lord Halifax, Secretary of State, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the North Briton, number 45, without any information or charge laid before the Secretary of State, previous to the granting thereof, and without naming any person whatsoever in the warrant; Carrington, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the North Briton, number 45, directed the defendant to execute the warrant upon the plaintiff (one of Leech's journeymen), and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the king's counsel, and saw the Solicitor of the Treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner; these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages; to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject: I thought that the 29th chapter of Magna Charta, *Nullus liber homo capiatur vel imprisonetur, &c., nec super eum ibimus, &c., nisi per legale judicium parium suorum vel per legem terrae, &c.*, which is pointed against arbitrary power, was violated. I cannot say what damages I should

have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages, against the Solicitor-General's argument. Upon the whole, I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

Barthurst J. concurs. *Per Curiam.*

New trial refused.

PETERSON *v.* WESTERN UNION TELEGRAPH CO.

Minnesota, 1896. 65 Minn. 18.

START, C. J. This is an action for libel, in which the plaintiff recovered a verdict for $5,200, and the defendant appealed from an order denying its motion for a new trial.

The defendant on January 19, 1893, received at its office in New Ulm, from Albert Blanchard, a message for transmission over its telegraph line to St. Paul, which reads thus: "New Ulm, 1-19, 1893. To S. D. Peterson, care Windsor, St. Paul, Minn.: Slippery Sam, your name is pants. [Signed] Many Republicans." The New Ulm operator sent the message over the wires to St. Paul, where it was taken from the wire by the operator, and delivered to the plaintiff in a sealed envelope bearing his address as stated in the message. * * *

3. The damages in this case are so excessive as to conclusively show that the verdict was the result of passion and prejudice. Courts should interfere with an assessment of damages by a jury with great caution, and sustain the verdict unless it appears that it was the result of passion or prejudice. But the verdict in this case admits of no defense. As correctly stated by the trial court in its instructions to the jury, the sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were limited to such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal and exposing himself to serious punishment, and that there is no evidence to justify the inference that the contents of the message ever reached the public, except through the plaintiff, a verdict as-

sessing his damages at $5,200 is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice.

The trial court seems to have regarded the damages so excessive as to justify a new trial, except for the fact that this is the second verdict in the case, and that one reason for setting aside the former verdict was that the damages were excessive. As a rule the court will not set aside a second verdict, * * * but where * * * the verdict is controlled by no reason, supported by no justice, and is manifestly the result of passion and prejudice, it is the duty of the court to set it aside. * * *

Order reversed and a new trial granted.

The cases show that the court has authority to set aside a verdict for excessive damages; and also for inadequate damages, and to award a new trial, unless plaintiff accepts a reduction. Chamberlain v. Lake Shore R. R. 122 Mich. 477.

Where a libel charged plaintiff with being a swindler, a forger and a thief, and the evidence shows that the publication was wholly false and that the newspaper took no pains to verify the article, held that a verdict for $1,000 was not excessive. Graybill v. De Young, 140 Cal. 323.

Where a married woman with a nursing babe was wrongfully ejected from a train, without money and without baggage, held, that a verdict of $500 was not excessive. Marlow v. S. P. 151 Cal. 383.

In Cherbuliez v. Parsons, 111 N. Y. Supp. 516, Mr. Justice STAPLETON held that where a bright, active and intelligent woman, forty years of age, was injured and became insane and lost her earning power, a judgment for $12,000 was justified.

See also Predmore v. Consumers' Light & Power Co., 91 N. Y. Supp. 118, a case of a death of an electrician due to defendant's negligence; also Cassasa v. N. Y. C. & H. R. R. R. Co. 95 N. Y. Supp 648, where a waiter upset a tray of food upon a lady's gown; Olwell v. Spoors, 126 Wis. 905, where a female clerk, unmarried, lost an eye and recovered $12,000, which the court reduced to $6,000; Walker v. Simmons Mfg Co. 131 Wis. 554, where plaintiff lost three fingers, and a judgment for $5,000 was sustained; Vogel v. McAuliffe, 31 Atl. Rep. 1, where defendant destroyed a furnace in a homestead where there was sickness, and a verdict for $400 was sustained; Galloway v. C. M. & St. P. R. R. 57 N. W. Rep. 1058, where $10,000 was held not too much for traumatic neurosis; Strand v. G. N. R. Co. 111 N. W. Rep. 958, where $30,000 was held excessive in case of a young man, 26 years old, badly burned, but whose mental faculties remained unimpaired; Bull v. C. R. I. & P. R. R. 116 N. W. Rep. 299, where $680 was held not an excessive judgment for destroying 35 acres of oats, 85 acres of corn and some live stock; Hocking v. Windsor Spring Co. 111 N. W. Rep. 685, where $5,000 was allowed for the loss of an eye; Carpenter v. City of Red Cloud, 89 N. W. Rep.

637, where $1 damages was set aside as inadequate where a laborer was incapacitated for a year, and spent $30 on doctors; Cobb v. Simon, 97 N. W. Rep. 276, where $1,000 was allowed for a false imprisonment where there was no violence and no public disgrace. See also Slingerland v. East Jersey Water Co. 58 N. J. L. 412.

The unanimous opinion of the U. S. Sup. Ct. in Railway Co. v Prentice, 147 U. S. 101, constitutes an exhaustive digest upon the question whether a principal can be charged with punitive damages for the wanton and malicious conduct of a servant. "The right to award such damages rests upon a single ground,—wrongful motive." Haines v. Schultz, 50 N. J. L. 481. Punitive damages cannot be awarded where the wrong was done,—as in case of a libel, without defendant's knowledge. Publishing Co. v. Kahn, 59 N. J. L. 218. So where plaintiff was ejected from a train without unnecessary violence, held, that punitive damages could not be awarded. Fohrman v. Consolidated Traction Co. 63 N. J. L. 391.

"The term 'compensatory damages' covers all loss recoverable as matter of right. It includes all damage for which the law gives compensation, and that gives rise to the term 'compensatory damages.' 'Compensatory damages' and 'actual damages' are synonymous terms. Pcuniary loss is an actual damage; so is bodily pain and suffering." Gatzow v. Buening, 106 Wis. 1.

"Smart money may only be given for malice." Mr. Justice GAYNOR in Magagnos v. B. H. R. 128 App. Div. N. Y. 182. See also W. U. Tel. Co. v. Smith, 64 Ohio, 106.

See Warner v. Southern Pacific Co. 113 Cal. 104, where a passenger was wrongfully ejected and $5,000 was held excessive; Roche v. Redington, 125 Cal. 174, where $4,000 was held not excessive for breaking the thigh-bone of a street-sweeper in San Francisco; Rueping v. N. W. Ry. Co. 116 Wis. 625, where $2,500 was held sufficient for breaking the leg of a man 45 years old who soon recovered so as to attend to business as before. In this last case all the precedents are carefully examined. In Bonneau v. North Shore R. R. 152 Cal. 406, a verdict of $7,500 was sustained where plaintiff was injured by derailment of a car which was precipitated into a creek.

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6. *Inadequate Damages.*

ROBINSON *v.* TOWN OF WAUPACA.

Wisconsin, 1890. 77 Wis. 544.

This is an action to recover damages for personal injuries to the plaintiff, alleged to have been caused by a defective highway in the defendant town. The plaintiff was riding with her husband in a vehicle on two wheels, called a "dog-cart,"

drawn by one horse. The trial resulted in a verdict for the plaintiff, assessing her damages at $167. The plaintiff moved for a new trial, mainly on the ground that the damages so assessed are inadequte to compensate her for the injury she proved she sustained. The motion was denied, and judgment was thereupon entered for the plaintiff, pursuant to the verdict from which judgment she appeals to this court.

LYON, J. * * * Were the damages which the jury awarded the plaintiff so inadequate to compensate her for the injuries she sustained that it was the duty of the Circuit Court to set aside the verdict for that reason? That the court may, and in a proper case should set aside a verdict for inadequacy of damages and award a new trial, is not questioned. This court so held in Emmons v. Sheldon, 26 Wis. 648, and Whitney v. Milwaukee, 65 Wis. 409. But, to justify the interference of the court with the verdict, it must appear from the testimony that the damages awarded are so grossly disproportionate to the injury that in awarding them the jury must have been influenced by a perverted judgment. The court was able thus to characterize the verdict in Emmons v. Sheldon, for the damages there awarded were but $5 (which charged the plaintiff with the costs of the action), although it was proved that the plaintiff suffered a most serious bodily injury. There seems to have been no controversy as to the extent of such injury. And so in Whitney v. Milwaukee, the undisputed evidence proved that the plaintiff was so seriously injured that the damages awarded by the jury therefor were grossly inadequate compensation, and so small that the plaintiff was chargeable with the costs, which exceeded the damages awarded. This court was able to say that the verdict was perverse, and that (quoting from the opinion delivered by Mr. Justice Orton) "such a verdict is trifling with a case in court and public justice, and unworthy of twelve good and lawful men, and is justly calculated to cast odiom on the jury system and jury trials."

We adhere to the rule established in those cases. Hence the question is, Does the testimony bring this case within the rule? In the consideration of this question we must assume that the jury found every fact going to mitigate or reduce the damages which they could properly find from the proofs. The testimony tends to show that the plaintiff was to some extent an invalid before she was injured, and that the pain and disability she

has suffered since the injury should, in part at least, be attributed to previous ill-health. Then the circumstances of the injury and her condition presently thereafter tend to show that the injury was not so severe as claimed. There is considerable testimony of the above character, and we think it sufficient materially to mitigate her claim for damages. Under the testimony, therefore, there is a wide margin for the jury in assessing damages. Probably a verdict for a much larger sum could have been held not excessive. Perhaps, if the plaintiff's testimony as to the extent of her injuries stood alone, it ought to be held that the damages are inadequate. But in view of all the testimony, and of the fact that the verdict has successfully passed the scrutiny of the learned Circuit judge, we do not feel warranted in saying that it is a perverse verdict. Hence, although we might have been better satisfied had a somewhat greater sum been awarded, we are not at liberty to disturb the verdict.

BY THE COURT.—The judgment of the Circuit Court is affirmed.

SAMUELS *v.* NEW YORK CITY RY. CO.

New York, 1906. 52 Misc. 137.

DAVIS, J. This is an appeal by plaintiff from a judgment for $5 rendered in his favor by the court without a jury, and from an order denying his motion for a new trial. The main ground of the motion for a new trial was the insufficiency of the damages awarded. The action was brought for breach of contract of carriage. The plaintiff testified that on April 26, 1906, he boarded defendant's car at the corner of Clinton and Stanton streets. The car went north on Avenue A as far as Fourteenth street, and then proceeded west through Fourteenth street. Plaintiff paid his fare and received a transfer. At Fourth avenue the conductor demanded fare from the plaintiff. The plaintiff told the conductor that he had already paid one fare, and refused to pay again. He also said that he would show his transfer. The conductor thereupon applied vile names to the plaintiff, and, as the plaintiff was trying to get his transfer from his pocket to exhibit it, the conductor got hold of the plaintiff by the coat and pulled him from the center of the car to the front, punched him, and while the plaintiff was holding on to the front

of the car, he punched him in the face. The car was full of people at the time. The plaintiff was corroborated in the main by two witnesses. The defendant offered no testimony.

We think the damages awarded in this case were altogether insufficient. If the plaintiff's story is true, he was grossly assaulted, wantonly insulted, and wrongfully ejected from the defendant's car by its servant. The court below believed his story. It was not contradicted. On this evidence the defendant clearly committed a breach of its contract of carriage for which the plaintiff is entitled to recover substantial damage, even though he proved no loss of wages or of time, or physical injuries. He is entitled to recover compensatory damages for injury done to his feelings and for the indignity suffered. Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25; Gillespie v. Bklyn. Hgts. R. R. Co., 178 N. Y. 347; Hines v. Dry Dock, 75 App. Div. 391.

The judgment should be reversed and a new trial granted with costs to appellant to abide the event.

All concur.

CORNISH *v.* NORTH N. J. STREET RAILWAY CO.

New Jersey, 1906. 73 N. J. L. 273.

GARRISON, J. By this rule to show cause the plaintiff seeks to set aside a verdict recovered by him upon the ground that the damages are inadequate. The action was for personal injuries. The verdict was for $250. The jury was instructed that the testimony showed that, in expenses and earnings, the plaintiff had lost $390 as a result of his injuries. The charge then proceeded as follows:

"But his injury produced some benefit to him; that is, he got a chance to call on the insurance company to pay him $8 a week, which was their contract in case he should receive harm, or meet with an accident while at work, I suppose. At any rate, he got $88 from the insurance company; so that he lost actually in the neighborhood of $310. From $300 to $325, between those figures, is the amount he is actually out, by reason of this accident, so far as expenditures and loss of earnings are concerned."

This instruction, by which the jury was permitted to give to the defendant the benefit of the plaintiff's insurance, was erroneous.

The fund out of which such payments were made was created

in part by the plaintiff's contributions made under a contract with strangers to the defendant and the tort-feasor was no more entitled to be credited with the sums repaid to the plaintiff under such contracts, than it would be to his withdrawal of his accumulations in a savings bank.

The principle is settled for this court by the opinion in Weber v. Morris & Essex Railroad Company, 36 N. J. Law, 213, where Chief Justice Beasley says: "A person committing a tort cannot set up in mitigation of damages that somebody else, with whom he has no connection, has either in whole or in part indemnified the party injured."

The rule to show cause is made absolute.

Where the damages awarded by the jury force the mind to the conclusion that the jury acted under the influence of a perverted judgment, a new trial must be granted. McNeill v. Lyons, 22 R. I. 7. Where the verdict covers only doctor's bills and loss of time and allows nothing for suffering and disability, a new trial will be granted. *Ibid.*

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7. *Liquidated Damages or Penalty.*

KEEBLE *v.* KEEBLE.

Alabama, 1888. 85 Ala. 552.

SOMERVILLE, J. The only question in this case is whether the sum of one thousand dollars, agreed to be paid by the appellant Henry C. Keeble, to Richard C. Keeble, the testator of the appellee, as mentioned in the written contract of employment between the parties, is to be regarded by the court as a penalty, or as liquidated damages. * * * The appellant was in the employment of the appellee's testator as a business manager, at very liberal wages, having been a partner with him in the mercantile business, under the firm name of R. C. Keeble & Co. Although he was but an employe, having sold to R. C. Keeble his entire interest in the partnership business, he remained ostensibly a partner. The terms of the employment, reduced to writing, imposed on the appellant, Henry Keeble, the obligation, among other duties, "to wholly abstain from the use of intoxicating liquors," and "to continue and remain sober," giving his diligent attention to the business of his employer, and promis-

ing, in the event he should become intoxicated, that he would pay, "as liquidated damages," the sum of $1000, which the testator, Richard Keeble, was authorized to retain out of a certain debt he owed the appellant. The appellant violated his promise by becoming intoxicated, and remained so for a long time, and acted rudely and insultingly towards the customers and employes of the testator, and otherwise deported himself, by reason of intoxication, in such manner as to do injury to the business.

It is not denied by appellant's counsel that this is a total breach of the promise to keep sober; nor is it argued that the damage resulting from the violation of such a promise can be ascertained with any degree of certainty; nor even that the amount agreed to be paid as liquidated damages, in the event of a breach, is disproportionate to the damages which may have been actually sustained in this case. But the contention seems to be that, inasmuch as it was possible for a breach to occur with no actual damages other than nominal, the amount agreed to be paid should be construed to be a penalty. Unless this view is correct, the application of the foregoing rules to the construction of the agreement manifestly stamps it as a stipulation for liquidated damages, and not a penalty. It is argued, in other words, that becoming intoxicated in private, while off duty, would be a violation of the contract, but would be attended with no actual damage to the business of R. C. Keeble & Co. This fact would, in our opinion, except the case from the operation of the rules above enunciated. There are but few agreements of this kind where the stipulation is to do or not to do a particular act, in which the damages may not, according to circumstances, vary, on a sliding scale, from nominal damages to a considerable sum. One may sell out the good-will of his business in a given locality, and agree to abstain from its further prosecution, or, in the event of his breach of his agreement, to pay a certain sum as liquidated damages; as, for example, not to practice one's profession as a physician or lawyer, not to run a steamboat on a certain river or to carry on the hotel business in a particular town, not to re-establish a newspaper for a given period, or to carry on a particular branch of business within a certain distance from a named city. In all such cases, as often decided, it is competent for the parties to stipulate for the payment of a gross sum by way of liquidated damages for the violation of the

agreement, and for the very reason that such damages are uncertain, fluctuating and incapable of easy ascertainment. Williams v. Vance, 30 Amer. Rep. 29-31, note; Graham v. Bickham, 1 Amer. Dec. 336-338, note; 1 Pomeroys Eq. Jur. § 442, note 1. It is clear that each of these various agreements may be violated by a substantial breach, and yet no damages might accrue except such as are nominal. The obligor may practice medicine, and possibly never interfere with the practice of the other contracting party; or law, without having a paying client; or he may run a steamboat without a passenger; or an hotel without a guest; or carry on a newspaper without the least injury to any competitor. But the law will not enter upon an investigation as to the *quantum* of damages in such cases. This is the very matter settled by the agreement of the parties. If the act agreed not to be done is one from which, in the ordinary course of events, damages, incapable of ascertainment save by conjecture, are liable naturally to follow, sometimes more and sometimes less, according to the aggravation of the act, the court will not stop to investigate the extent of the grievance complained of as a total breach, but will accept the sum agreed on as a proper and just measurement, by way of liquidated damages, unless the real intention of the parties, under the rules above announced, designed it as a penalty.

We may add, moreover, that no one can accurately estimate the physiological relation between private and public drunkenness, nor the casual connection between intoxication one time and a score of times. The latter, in each instance, may follow from the former, and the one may naturally lead to the other. There would seem to be nothing harsh or unreasonable in stipulating against the very source and beginning of the more aggravated evil sought to be avoided. The duty resting on the court, in all these cases, is to so apply the settled rules of construction as to ascertain the legally expressed and real intention of the parties. Courts are under no obligations, nor have they the power, to make a wiser or better contract for either of the parties than he may be supposed to have made for himself.

The court below, in our judgment, did not err in holding, as it did, by its rulings, that the sum agreed to be paid the appellee's testator was liquidated damages, and not a penalty.

Affirmed.

SMITH *v.* BERGENREN.

Massachusetts, 1891. 153 Mass. 236.

HOLMES, J. The defendant covenanted never to practice his profession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff $2,000, "but not otherwise." This sum of $2,000 was not liquidated damages; still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he agreed not to do. It was a price fixed for what the contract permitted him to do if he paid. The defendant expressly covenanted not to return to practice in Gloucester unless he paid this price. It would be against common sense to say that he could avoid the effect of thus having named the sum by simply returning to practice without paying, and could escape for a less sum if the jury thought the damage done the plaintiff by his competition was less that $2,000. The express covenant imported the further agreement that if the defendant did return to practice he would pay the price. No technical words are necessary if the intent is fairly to be gathered from the instrument. St. Albans v. Ellis, 16 East, 352; Stevinson's Case, 1 Leon. 324; Bank v. Marshall, 40 Ch. Div. 112.

If the sum had been fixed as liquidated damages, the defendant would have been bound to pay it. Cushing v. Drew, 97 Mass. 445; Lynde v. Thompson, 2 Allen, 456; Holbrook v. Tobey, 66 Me. 410. But this case falls within the language of Lord Mansfield in Lowe v. Peers, 4 Burrows, 2225, 2229, that if there is a covenant not to plough, with a penalty, in a lease, a court of equity will relieve against the penalty; "but if it is worded 'to pay £5 an acre for every acre ploughed up,' there is no alternative; no room for any relief against it; no compensation. It is the substance of the agreement." See, also, Ropes v. Upton, 125 Mass. 258, 260. The ruling excepted to did the defendant no wrong. In the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

TENNESSEE MANUFACTURING CO. *v.* JAMES.

Tennessee, 1892. 91 Tenn. 154.

MINNIE JAMES, a minor, was an employe of the appellant, a corporation engaged in the manufacture of cotton goods. The contract of employment was in writing; by one of its provisions it was stipulated that the employe should give two weeks' notice of her intention to quit. It is further provided that in case she should leave without giving two weeks' notice, or fail or refuse faithfully to work during a period of two weeks after giving such notice, then the sum of ten dollars was "agreed upon as liquidated damages due said Tennessee Manufacturing Company at the time of my failure to comply with the terms of this contract, to compensate it for all damages, both actual and exemplary, and all loss arising from my failure to carry out the terms of this agreement."

Appellee gave notice of her intention to leave, and thereafter worked ten days. But at the end of that time she quit without any excuse. At the time she quit there was due her twenty days wages (amounting to ten dollars), including the ten days after her notice. If the stipulation as to damages was invalid, the company owes her ten dollars; if valid, then nothing is due her. She sues, by her father as next friend, upon a *quantum meruit.*

LURTON, J. We agree with the Circuit Judge in holding that this contract does not fall within the case of Schrimpf v. Manufacturing Co., 86 Tenn., 219. That case concerned a contract construed as stipulating for a penalty in case of a breach. It was held not to be an agreement for liquidated damages, because the forfeiture covered all the wages due at time of breach, regardless of amount due, and regardless as to whether the arrearages were the consequence of the default of the company. It was a contract hard and unconscionable. It preserved no proportion between the sum forfeited and the actual damages, and put all employes upon same footing, whether much or little was earned, much or little due, when breach occurred. The damages were to be all that was due, in any case. To one this might have been the wages of months; to another, the earnings of but a day. But in that case Chief Justice Turney quoted and indorsed the language of Campbell, J., in Richardson v. Woehler, 26 Mich. 90, where he said: "We have no difficulty in holding

that the injury caused by the sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed on, and shall not be unreasonable or an oppressive exaction, there would seem to be no legal objection to the stipulation, if both parties are equally and justly protected."

Applying these principles to the case for judgment, we have no difficulty in holding that the stipulation here is for liquidated damages, and not for a penalty, and that the contract is neither unreasonable nor oppressive. "The tendency and preference of the law is to regard stated sums as a penalty, because actual damages can then be recovered, and the recovery limited to such damages. This tendency and preference however, does not exist when the actual damages cannot be ascertained by any standard. A stipulation to liquidate damages in such cases is considered favorably." 1 Sutherland on Damages 490.

This contract of employment on its face affords no *data* by which the actual damages likely to result from its non-observance can with any certainty be ascertained. Such a circumstance has been regarded as justifying the courts in holding the sum stipulated as liquidated damages.

The plaintiff in error was a cotton-mill, having in its employment hundreds of hands. The work is divided into many departments. The same material is handled by one set of hands, and put in condition for another, and the second department still further advances its manufacture; and so on, through successive stages of progress. The evidence shows that each department is dependent upon that immediately below it. Now, if the operatives of one department quit, or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will, to some extent, affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise, actual loss due to an unexpected breach of an employe's engagement; though it is shown that there are some departments of work where the quitting of a small number of hands, without notice, would stop the entire mill, and throw

other hundreds out of employment. In this day of great factories, and the consequent division of labor into separate departments, a degree of interdependence among employes exists, which they ought and do recognize, and which makes the obligation of each to the whole, and to the common employer, all the more important. The case is one, then, where the certainty of some damage, and the uncertainty of means and standards by which the actual damage can be ascertained, requires the courts to uphold the contract as one for liquidated damages, and not as providing for a penalty. The sum fixed is certain. It is proportioned to the earning capacity of the employe, and hence presumably with regard to the particular results of a breach in each department. There is no hardship in the agreement requiring two weeks' notice. If the operative leaves for good cause, the contract would not apply. If able to work, the pay continues until notice has been worked out.

That she returned the next day after quitting, and offered to work out her notice, is no compliance. The mischief had been done. She had voluntarily, and without pretence of excuse, or asking to be released, gone off, and left her work standing, and endeavored to get others to go with her. The damages had accrued, and, under the facts of this case, appellant was not bound to restore her.

Reverse. Judgment here for plaintiff in error.

MONMOUTH PARK ASSOC. *v.* WALLIS IRON WORKS.

New Jersey Court of Errors and Appeals, 1893.

55 N. J. L. 132.

The plaintiff sued for work under a sealed contract, the material part of which is as follows:

"In case said party of the first part shall [fail] to fully and entirely, and in conformity to the provisions and conditions of this agreement, perform and complete the said work, and each and every part and appurtenance thereto, within the time hereinbefore limited for such performance and completion, or within such further time as in accordance with the provisions of this agreement shall be fixed or allowed for such performance and completion, the said party of the first part shall and will pay to the said party of the second part the sum of one hundred dollars for each and every day that they, the said party

of the first part, shall be in default, which said sum of one hundred dollars per day is hereby agreed upon, fixed and determined by the parties hereto as the damages which the party of the second part will suffer by reason of such default, and not by way of penalty. And the said party of the second part may and shall deduct and retain the same out of any moneys which may be due or become due to the party of the first part under this agreement."

DIXON, J. * * * Taking the case thus perfected the plaintiff urged that the $100 a day was a penalty; and so the trial judge ruled, requiring that the defendant should prove the actual damages and be allowed only for what was proved. To this ruling the defendant excepted.

In determining whether a sum, which contracting parties have declared payable on default in performance of their contract, is to be deemed a penalty or liquidated damages, the general rule is that the agreement of the parties will be effectuated. Their agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If, on such consideration, it appears that they have provided for larger damages than the law permits, e. g., more than the legal rate for the non-payment of money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such breaches clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award, under any of these conditions the sum designated is deemed a penalty. And if it be doubtful on the whole agreement whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors mere indemnity. But when damages are to be sustained by the breach of a single stipulation, and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then, if the parties have agreed upon a sum as the measure of compensation for the breach, and that sum is not disproportionate to the presumable loss, it may be recovered as liquidated damages. These are the general principles laid down in the text-books and recognized in the judicial reports of this State. Cheddick's Executor v. Marsh, 1 Zab.

463; Whitefield v. Levy, 6 Vroom, 149; Hoagland v. Segur, 9 Id. 230; Lansing v. Dodd, 16 Id. 525.

In the present case the default consists of the breach of a single covenant, to complete the grand stand as described in the approved plans and specifications within the time limited. It is plain that the loss to result from such a breach is not easily ascertainable. The magnitude and importance of the grand stand may be inferred from its cost—$133,000. It formed a necessary part of a very expensive enterprise. The structure was not one that could be said to have a definable rental value. Its worth depended upon the success of the entire venture. How far the non-completion of this edifice might affect that success, and what the profits or losses of the scheme would be, were topics for conjecture only. The conditions therefore seem to have been such as to justify the parties in settling for themselves the measure of compensation.

The stipulation of parties for specified damages, on the breach of a contract to build within a limited time, have frequently been enforced by the courts. In Fletcher v. Dycke, 2 T. R. 32, £10 per week for delay in finishing the parish church; in Duckworth v. Alison, 1 Mees. & W. 412, £5 per week for delay in completing repairs of a warehouse; in Legge v. Harlock, 12 Q. B. 1015, £1 per day for delay in erecting a barn, wagon-shed, and granary; in Law v. Local Board of Redditch, (1892) 1 Q. B. 127, £100 and £5 per week for delay in constructing sewerage works; in Ward v. Hudson River Building Co., 125 N. Y. 230, $10 a day for delay in erecting dwelling-houses, and in Malone v. City of Philadelphia, 23 Atl. Rep. 628, $50 a day for delay in completing a municipal bridge, were all deemed liquidated damages. Counsel has referred us to two cases of building contracts, where a different conclusion was reached—Muldoon v. Lynch, 66 Cal. 536, and Clement v. Schuylkill River R. R. Co., 132 Pa. 445. In the former case a statutory rule prevailed, and in the latter the real damage was easily ascertainable and the stipulated sum was unconscionable. In the case at bar, we have no *data* for saying that $100 a day was unconscionable.

The sole question remaining on this exception, therefore, is whether the parties have agreed upon the sum named as liquidated damages.

Their language seems indisputably to have this meaning. They expressly declare the sum to be agreed upon as the dam-

ages which the defendant will suffer; they expressly deny that they mean it as a penalty, and they provide for its deduction and retention by the defendant in a mode which could be applied only if the sum be considered liquidated damages.

But it is argued that, as the contract authorized the engineer of the defendant to make any alterations or additions that he might find necessary during the progress of the structure, and required the plaintiff to accede thereto, it is unreasonable to suppose that the plaintiff could have intended to bind itself in liquidated damages for delay in completing such a changeable contract.

But this argument seems to be aside from the present inquiry, which is, not whether the plaintiff became responsible for damages by reason of the non-completion of the grand stand on the day named, but whether, if it did become so responsible, those damages are liquidated by the contract. On the question first stated, changes ordered by the engineer may afford matter for consideration; on the second question, they are irrelevant.

Certainly the bills of exceptions do not indicate any alterations or additions which, as matter of law, would relieve the plaintiff from responsibility for the admitted delay, and consequently there may have been ground for considering the defendant's damages. If there was, the amount of the damages was adjusted by the contract at $100 per day.

We think the ruling at the Circuit, on this point, was erroneous. * * *

CURTIS *v.* VAN BERGH.

New York, 1899. 161 N. Y. 47.

This action was brought to recover rent reserved for the use of a certain building in the city of Rochester under a written contract and lease. The defendants pleaded a counterclaim arising out of the following facts, which might have been found by the jury upon the trial: For some years prior to January 23, 1896, the defendants had been engaged in the manufacture of plated silverware in the Butts Building in said city, employing a large number of men, and doing a general business as well as furnishing goods upon contract. They were prosperous, and finally outgrew their old quarters. As their lease was to expire on the 1st of July, 1896, in order to meet the rapid growth of their business they entered into a contract with the plaintiff's

assignor on the 23rd of January, 1896, whereby he agreed to erect and complete a building according to certain plans and specifications, already prepared, and have it ready for occupancy on or before July 1, 1896, and to let the same to the defendants, with steam heat and power, for the term of five years from that day, with the privilege of five years more, at the rent reserved of $2,100 a year, which the defendants agreed to pay during the first period named. Said agreement contained, among other covenants on the part of the plaintiff's assignor, the following: "In case the said party of the first part shall be unable for any reason to erect said building according to the plans and specification hereinbefore referred to, and to have the same completed on or before the first day of July, 1896, then, and in that case, said party of the first part shall pay to the said parties of the second part the sum of $50 for each day after July 1, 1896, that the same shall not be completed, as fixed, settled, and liquidated damages of the parties of the second part which they will sustain by reason of the failure of said party of the first part to complete said building at the time hereinbefore specified." The plaintiff's assignor did not complete the building for defendants' full occupation until August 3rd, although a few days earlier they began to move into the basement, and they did not learn that they could not have the premises at the time agreed upon until the 23rd of June. They were accustomed to make goods in the summer for their fall and holiday trade, and to send out their travelers about the middle of August. They relied upon the additional room and new machinery to get their work out in July, but were unable to do so. Owing to the failure to get into the new building, they could not make the goods required by their business, or even furnish samples to their agents, and the result was a loss of business instead of an increase, as was expected, on account of the additional facilities. They discharged some of their men, and did not begin to make holiday goods until August 15th. The wages account ran down from an average of $350 a week in June to about $165 in July. They tried to get more room in the old building, but could not do so, although they finally succeeded in securing the use of their old quarters for the month of July. The new premises contained four times as much room as the old, and with the new machinery, which they ordered in reliance upon the contract, had three or four times the manufacturing

capacity of the old. If the building had been ready on the 1st of July, they could have moved in two days, but as it was, they had to move, at an increased expense, small parcels of their machinery and effects at a time, as the partial completion of the building made room for it. The contract required an elevator with a capacity of 2,500 pounds for the exclusive use of defendants, but the elevator was not ready until the middle of August, so that they were compelled to hoist their machinery by ropes. The defendants offered on the trial to show a large increase of business during every month of 1896 over the corresponding month of 1895, except July and August, when there was a loss, but the evidence was excluded upon the objection of the plaintiff, and the defendants excepted. At the close of the evidence the counsel for the plaintiff moved for the direction of a verdict in his favor for the amount of the rent claimed. The counsel for the defendants asked to go to the jury on the whole case, "on the intention of the parties whether they intended to liquidate the damages," and "on the question as to whether or not the damage sustained by these people is out of all due proportion to the liquidated damages stated in the contract." The trial court refused to submit the case to the jury, and directed a verdict in favor of the plaintiff, the defendants excepting separately to each ruling, and from the judgment of affirmance rendered by the appellate division they have appealed to this court.

VANN, J. The question presented by this appeal is whether the sum which the plaintiff's assignor promised to pay the defendants for each day's delay in completing the building after expiration of the period stipulated is in the nature of a penalty or of liquidated damages. This question depends upon the intention of the parties, which is to be gathered from the language used in making the contract, read in the light of the circumstances surrounding them at the time. Little v. Banks, 85 N. Y. 258, 266; Kemp v. Ice Co., 69 N. Y. 45, 58; Colwell v. Lawrence, 38 N. Y. 71, 74. The words of the contract are that the sum of $50 shall be paid by the plaintiff's assignor to the defendants for each day after the date named for performance "as fixed, settled, and liquidated damages" which the defendants "will sustain by reason of the failure * * * to complete said building" within the time specified. If this language is given its ordinary meaning, the parties have not only defined

the sum promised to be paid as liquidated damages, but have expressly covenanted that it is the amount of damage which the defendants would sustain in consequence of the delay, thus limiting recovery to the sum named, even if the actual damages should greatly exceed it. The plaintiff, however, contends that the language of the agreement is not conclusive, and that these words should not be given their ordinary meaning, because the per diem payment is so excessive as to shock one's sense of justice, and to warrant the inference that the parties could not have intended what they said, because it would be unreasonable. It is insisted that, as the rent reserved was but $5.75 per day, the sum of $50 for each day's delay is so out of proportion to the probable loss as to bring the contract within that class of cases which hold that where the sum agreed to be paid is so great as to be unconscionable it will be regarded as a penalty, even if the parties have expressly declared their intention to be otherwise. Kemble v. Farren, 8 Bing. 141; Jackson v. Baker, 2 Edw. Ch. 470; Spencer v. Tilden, 5 Cow. 144; Niver v. Rossman, 18 Barb. 50; Mott v. Mott, 11 Barb. 134; Beale v. Hayes, 5 Sandf. 640. These authorities show that the courts have struggled hard against the apparent intention of the parties, in order to relieve the one in default from an improvident bargain. It is, however, the law of this state, as settled by this court, that, where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages when the actual damages contemplated at the time the agreement was made "are in their nature uncertain, and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss." Ward v. Building Co., 125 N. Y. 230; Little v. Banks, 85 N. Y. 258; Kemp v. Ice Co., 69 N. Y. 45, 57; Clement v. Cash, 21 N. Y. 253; Bagley v. Peddie, 5 Sandf. 192; Id., 16 N. Y. 469; Dunlop v. Gregory, 10 N. Y. 241; Cotheal v. Talmage, 9 N. Y. 551.

We thus reach the ultimate question whether the damages within the contemplation of the parties when they made the contract in question are so uncertain as to be difficult of ascertainment, and, if so, whether they are so grossly excessive as to be out of all proportion to the probable loss. In making said contract the defendants provided for the lease of a building, to be erected, when there was less than six months' time within which

to complete it, and they needed protection from the consequences of failure. They were engaged in a growing and profitable manufacturing business, which required more room and additional machinery. It was necessary to have the new building ready when their old lease expired, or their business would be seriously interrupted, and they would have no place to put either their new or their old machinery. Moreover, they could not manufacture goods for the fall and holiday trade, and they would be subject to summary ejectment from their old quarters for holding over after expiration of their term. It was doubtful whether, at midsummer, they could secure another place, temporarily, and, if they could, it would compel them to move twice, at an increased expense and loss of time. Both parties knew that the failure to have the building ready on time would naturally result in the loss of business, and either in the temporary occupation of another building or a forcible removal through legal process. These elements of damage, which were necessarily within the contemplation of the parties, as reasonable men, when they made the contract, are uncertain, hard to ascertin with exactness, and dependent upon extrinsic circumstances and considerations. Who can tell the loss to a large manufacturing business, caused by closing the works in a busy season, by the removal of such a business to temporary quarters, or by summary dispossession at the hands of an officer? Who can estimate the injury to a manufacturing plant under such circumstances? What is more difficult to prove than loss of profits or damages to a business? What pecuniary standard is there to measure them by? Little v. Banks, *supra*. How can the amount be fixed except by agreement? The damages, under the facts before us, are necessarily hard to establish with exactness, or otherwise, yet they may be so serious as to render it desirable to have the amount agreed upon in advance. The parties themselves can "come to a more satisfactory conclusion as to the damages than would be possible for a jury." Jones v. Binford, 74 Me. 445. This is, therefore, one of those cases where it must be presumed that the parties stipulated for the payment of a fixed sum of money absolutely "from the difficulty of ascertaining any exact amount of damages which would be sustained by a breach of the agreement." Chase v. Allen, 13 Gray, 42.

Is the sum agreed upon out of all proportion to the probable loss, under the circumstances known to the parties when the

agreement was made? Is it so disproportionate that one "would start at the mere mention of it?" which is the test laid down in Cotheal v. Talmage, *supra*. Of course, the parties did not contemplate a long delay in completing the building, or neither of them would have entered into the contract at all. We cannot say, as matter of law, that $50 a day for the absolute suspension of a prosperous manufacturing business for a few days, at the busiest season of the year, accompanied by a temporary removal to other quarters, or a forcible removal to the street, is so excessive as to shock one's sense of justice. It is less in proportion to the actual damages than the amounts sustained in several of the cases cited. Indeed, the actual damages might exceed it, and the covenant thus prove a protection to the one in default. We think the learned trial judge erred in directing a verdict for the plaintiff, and that the judgment below should be reversed, and a new trial granted, with costs to abide the event. All concur. *Judgment reversed, etc.*

ILLINOIS CENT. R. CO. *v.* CABINET CO.

Tennessee, 1900. 104 Tenn. 568.

The Southern Seating and Cabinet Company entered into a contract with the rector of St. John's Episcopal Church at Petersburg, Va., to manufacture and put in certain church pews at a cost of $524; the contract containing a provision for liquidated damages at $10 per day for each day of delay after May 6, 1898. The pews were manufactured and shipped over the defendant railroad company's lines; its agent being notified of the nature of the contract with the church. The pews arrived 24 days late, and the cabinet company settled with the church for $344; a deduction of $180 being made for the delay. There had been a misdirection in the way bill.

CALDWELL, J. * * * Where property is shipped to market for general sale to such purchasers as may be obtained, and the carrier unreasonably and negligently delays the transportation, the measure of damages for that default is the depreciation in salable quality and market value of the property at the place of destination between the time when it should have arrived and when it did in fact arrive. Railroad Co. v. Hale, 85 Tenn. 69; Hutchinson on Carriers § 771; 3 Wood's Railway Law, 1607; but, if the property is sold at an advantageous price before ship-

ment, on condition that it be delivered within a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and through negligence fails to make the delivery in time, and the conditional purchaser declines to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at the place of destination and the price at which it was conditionally sold before shipment. Deming v. Railway Co., 48 N. H. 455; Hutchinson on Carriers § 772.

The difference between the modes of measuring the carrier's liability in the two cases is due to the difference between its obligations and the consequences of their breach. In the former case the obligation is general, and the loss and liability are general, while in the latter case the obligation is special, and the loss and liability are special.

Referring to the carrier's responsibility for the breach of a special contract by delay, a distinguished author has said: "But if the intended use and application of the goods to be carried were expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from circumstances known to them, so that the special use or application might be fairly considered to be within the contemplation of both parties to the contracts, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract." 3 Wood's Railway Law, 1607.

The contract, breached by the defendant, now before the court, was undoubtedly a special one. The pews in question were manufactured after a peculiar design, for a particular church, under a particular contract, of which the defendant was distinctly notified at the time it accepted them for carriage. The contract of carriage being special, the liability for its nonobservance was likewise special, and the plaintiff was entitled to recover all damages naturally resulting from the breach, whatever the amount may have been.

The trial judge, in that portion of the charge heretofore quoted, instructed the jury, in substance, that the proper measure of the plaintiff's recovery, if any should be allowed, would be the penalty of its contract with the consignee for the period the pews were delayed beyond the time therein stipulated as the

required date of delivery, which, the record shows, amounted to $180, the sum actually deducted by the consignee from the purchase price of the pews. That was certainly the amount of the plaintiff's real loss, and, in view of the notice given at the time of the shipment, it may fairly and reasonably be assumed to be the exact extent of the injury which the plaintiff and the defendant contemplated as the natural result of so long a delay in the delivery of the pews, and therefore the true measure of damages recoverable for the breach. * * *

The motion to modify is overruled.

CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY *v.* DON JOSE RAMOS YZQUIERDO Y CASTANEDA.

L. R. 1905, Appeal Cases, 6.

The Spanish Government sought to recover penalties incurred under a contract for the construction of two torpedo-boat destroyers.

The contracts contained this clause:

"The penalty for later delivery shall be at the rate of 500 l. per week for each vessel not delivered by the contractors in the contract time."

The respondents claimed damages for 135 weeks delay or 67,500 l. in all, with interest.

EARL OF HALSBURY, L. C.: My Lords, this is a case in which a party to an agreement has admittedly broken it, and an action was brought for the purpose of enforcing the payment of a sum of money which, by the agreement between the parties, was fixed as that which the defendants were to pay in the event that has happened.

Two objections have been made to the enforcements of payment. The first objection is one which appears upon the face of the instrument itself, namely, that it is a penalty, and not, therefore, recoverable as a practical arrangement of the amount of damages resulting from the breach of contract. It cannot, I think, be denied—indeed, I think it has been frankly admitted by the learned counsel—that not much reliance can be placed upon the mere use of certain words. Both in England and in Scotland it has been pointed out that the Court must proceed according to what is the real nature of the transaction, and that

the mere use of the word "penalty" on the one side, or "damages" on the other, would not be conclusive as to the rights of the parties. It is, I think, not denied now that the law is the same both in England and in Scotland. The different form of its administration gave rise doubtless to the Act of William III. (8 & 9 Will. 3, c. 11), s 8, which, of course, is that upon which English lawyers rely when this question occurs; but that difference only arose from a difference in the mode of administering in this country the two branches of jurisprudence which we call law and equity, while the Scotch judges had full jurisdiction in each of the Courts to administer justice, and in administering justice to administer it according to both branches of jurisprudence.

We come them to the question:—What is the agreement here? and whether this sum of money is one which can be recovered as an agreed sum as damages, or whether, as has been contended, it is simply a penalty to be held over the other party *in terrorem* —whether it is, what I think gave the jurisdiction to the Courts in both countries to interfere at all in any agreement between the parties, unconscionable and extravagant, and one which no Court ought to allow to be enforced.

My Lords, it is impossible to lay down any abstract rule as to what it may or it may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case. I suppose it would be possible in the most ordinary case, where people know what is the thing to be done and what is agreed to be paid, to say whether the amount was unconscionable or not. For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for 50 l., you were to pay a million of money as a penalty, the extravagance of that would be at once apparent. Between such an extreme case as I have supposed and other cases, a great deal must depend upon the nature of the transaction—the thing to be done, the loss likely to accrue to the person who is endeavoring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon that subject, because the thing speaks for itself. But, on the other hand, it is quite certain, and an established principle in both countries, that the parties may agree before hand to say, "Such and such a sum shall be damages if I break my agreement." The very reason why the parties

do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult and expensive. If I wanted an example of what might or might not be said and done in controversies upon damages, unless the parties had agreed beforehand, I could not have a better example than that which the learned counsel has been entertaining us with for the last half-hour in respect of the damage resulting to the Spanish Government by the withholding of these vessels beyond the stipulated period. Supposing there was no such bargain, and supposing the Spanish Government had to prove damages in the ordinary way without insisting upon the stipulated amount of them, just imagine what would have to be the cross-examination of every person connected with the Spanish Administration such as is suggested by the commentaries of the learned counsel: "You have so many thousand miles of coast-line to defend by your torpedo-boat destroyers; what would four torpedo-boat destroyers do for that purpose? How could you say you are damaged by their non-delivery? How many filibustering expeditions could you have stopped by the use of four torpedo-boat destroyers?"

My Lords, I need not pursue that topic. It is obvious on the face of it that the very thing intended to be provided against by this pactional amount of damages is to avoid that kind of minute and somewhat difficult and complex system of examination which would be necessary if you were to attempt to prove the damage. As I pointed out to the learned counsel during the course of his argument, in order to do that properly and to have any real effect upon any tribunal determining that question, one ought to have before one's mind the whole administration of the Spanish Navy—how they were going to use their torpedo-boat destroyers in one place rather than another, and what would be the relative speed of all the boats they possessed in relation to those which they were getting by this agreement. It would be absolutely idle and impossible to enter into a question of that sort unless you had some kind of agreement between the parties as to what was the real measure of damages which ought to be applied.

Then the other learned counsel suggests that you cannot have damages of this character, because really in the case of a war-ship it has no value at all. That is a strange and somewhat bold assertion. If it was an ordinary commercial vessel capable

being used for obtaining profits, I suppose there would not be very much difficulty in finding out what the ordinary use of a vessel of this size and capacity and so forth would be, what would be the hire of such a vessel, and what would therefore be the equivalent in money of not obtaining the use of that vessel according to the agreement during the period which had elapsed between the time of proper delivery and the time at which it was delivered in fact. But, says the learned counsel, you cannot apply that principle to the case of a warship because a warship does not earn money. It is certainly a somewhat bold contention. I should have thought that the fact that a warship is a warship, her very existence as a warship capable of use for such and such a time, would prove the fact of damage if the party was deprived of it, although the actual amount to be earned by it, and in that sense to be obtained by the payment of the price for it, might not be very easily ascertained—not so easily ascertained as if the vessel were used for commercial purposes and where its hire as a commercial vessel is ascertainable in money. But, my Lords, is that a reason for saying that you are not to have damages at all? It seems to me it is hopeless to make such a contention, and although that would not in itself be a very cogent argument because the law might be so absurd, yet it would be a very startling proposition to say that you never could have agreed damages for the non-delivery of a ship of war although, under the very same words with exactly the same phraseology in the particular contract, you might have damages if it was a vessel used for commercial purposes; so that you would have to give a different construction to the very same words according to whether the thing agreed to be built was a warship or a ship intended for commercial purposes. My Lords, I think it is only necessary to state the contention to show that it is utterly unsound.

Then there comes another argument which, to my mind, is more startling still: the vessel was to be delivered at such and such a time; it was not delivered, but the fleet the Spanish Government had was sent out at such a time and the greater part of it was sunk, and, says the learned counsel, "If we had kept our contract and delivered these vessels they would have shared the fate of the other vessels belonging to the Spanish Goverment, and therefore in fact you have got your ships now, whereas if we had kept our contract they would have been at the bottom of the

Atlantic." My Lords, I confess, after some experience, I do not think I ever heard an argument of that sort before, and I do not think I shall often hear it again. Nothing could be more absurd than such a contention, which, if it were reduced to a compendious form such as one has in a marginal note, would certainly be a striking example of jurisprudence. I think I need say no more to show how utterly absurd such a contention is. I pass on to the other question.

Lord Davey and Lord Robertson write concurring opinions.

Appeal dismissed.

PYE *v.* BRITISH AUTOMOBILE COMMERCIAL SYNDICATE LIMITED.

L. R. I. K. B. 1906, 425.

BIGHAM, J. This was an action by the plaintiff to recover back a sum deposited by him with the defendants on the making of an agreement on January 29, 1904. The plaintiff says, in the events which have happened he is entitled to be repaid this sum as money in the hands of the defendants to his use.

The question depends on the construction of the agreement of January 29, 1904. It has been described as an agency agreement, but it is not so in point of law. It is an agreement by which the defendant company appointed the plaintiff to be their sole agent for a certain district in Yorkshire for the sale of Talbot motor cars, and by the same agreement it was stipulated that so long as the plaintiff should be their sole agent for that district, they would not deliver any of their motor cars to any person resident or carrying on business in that district.

The meaning of those two provisions is, as I think, that the defendants say that the plaintiff shall deal in their motor cars in that district, and that no one else shall, so far as the defendants are concerned, deal in these cars in that district, and that the plaintiff shall be solely entitled to sell them. It was never intended, apparently, that the plaintiff should sell anything for or on account of the defendants. He was not their agent at all but he himself was to buy from them motor cars at specified prices, to be delivered by the defendants at certain specified times. He was, therefore, to be a buyer from the defendants on the terms that the defendants should not sell any cars through any other person in the district, and if the plaintiff wanted to

sell more cars, he was entitled to have them from the defendants. It was an agreement that the defendants should sell to the plaintiff certain cars at certain prices and at certain dates and if it was broken the defendants were to be at liberty to sell their cars by other means in the district.

Now what happened was this. There was a breach of the agreement. [The learned judge then narrated the facts on which he came to this conclusion, and continued:—] The defendants then said: We now claim to forfeit the 300 l., the contract having been broken. The question is whether they are entitled to do so. They say that they are, by reason of the last words in clause 7 of the contract. It is said that the effect of those words is not only that the money shall be repaid on payment by the plaintiff of the price of all the goods supplied, but that it shall not be repaid unless they are all paid for. I am not sure whether that construction is right or not. The non-payment might be due to the defendants' conduct, and then they would clearly not be entitled to retain the 300 l. If, for instance, they were to tender cars which were not in accordance with the contract, which the plaintiff, therefore, was not bound to receive, I do not think they would be entitled to retain the deposit. It may be urged that as they had chosen to put an end to the contract, and so to prevent the plaintiff from receiving any more cars, they have themselves put it out of the plaintiff's power to fulfill the contract, and therefore cannot retain the 300 l. But that is, I think, immaterial, because in my opinion the defendants are entitled to retain the 300 l. under clause 8.

I have to find out from the language there used what was the intention of the parties to the contract. If it were not for the authorities which are supposed to guide judges in endeavoring to discover the intention of the parties, I should have no doubt about it. The plaintiff put 300 l. into the hands of the defendants and subscribed an agreement which contains a statement that the defendants may keep that sum if he makes default in payment. Those circumstances point only, as it seems to me, to the intention that the defendants should keep the money if the events were to happen which have happened. But it is said that my finding as to the intention of the parties is to be controlled by the rules which have been laid down in the authorities which have been cited. I think the only rule which applies to all cases is that the judge must look to all the cir-

cumstances of each particular contract—to what the parties did as well as to the language used—and must say from them what the intention of the parties was. No doubt, notwithstanding the observations of Jessel M. R. in Wallis v. Smith, 21 Ch. D. 243, one thing to be taken into consideration is to see whether the sum agreed to be paid is to be paid on the happening of one event or of many events some of which may be of great and some of small importance, and with great deference to the criticism of Jessel M. R. in that case, I think the dictum of Lord Coleridge C. J. in Magee v. Lavell, L. R. 9. C. P. 107, at p. 111, is right when he said in the course of the argument: "The general principle of law appears to be that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." I have myself always understood that that is one of the rules which must guide a judge when he has to discover what the intention of the parties was. The only exception I would take to that dictum is the use of the word "must" and I am sure that Lord Coleridge C. J. did not mean to say that if other circumstances existed which would throw light on the intention of the parties in making the agreement a judge might not come to a contrary conclusion. He meant only that this fact was an important matter to take into consideration when seeking to find out the intention of the parties. I think that in that dictum the Chief Justice correctly laid down the law as expressed in the authorities. Here I think that this sum of 300 l. is a sum payable upon the happening of one of many possible breaches of different significance. I have already pointed out that the refusal to pay for a machine the price of which was less than 300 l. might entail serious consequences to the defendants outside the non-payment of the price. It might make it necessary for the defendants to put an end to the contract and to make different arrangements for the sale of their motor cars in this district, and that fact may well have been in their minds when they entered into this agreement. It is impossible to say that the non-payment of the price of a particular motor car is the only damage which the defendants would sustain from the plaintiff's refusal to accept it. Therefore, although there are circumstances here which seem to bring the case within the rule enunciated by Lord Coleridge C. J., there are other circumstances which

prevent that rule from applying. There is also this further fact that this agreement does not merely contain a stipulation that in the event of a breach of the contract the sum of 300 l. shall be paid as liquidated damages. The plaintiff here has himself already paid this sum to the defendants. He has parted with the money, and that circumstance is significant to show that he did not intend to have it back if he committed a breach of the agreement. I pray in aid, although I am not sure that I am entitled to do so, the language of Jessel M. R. in Wallis v. Smith, *supra*, where he says: "Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does not apply, and that the bargain of the parties is to be carried out." I have asked council if they could find me some of the cases to which the Master of the Rolls there referred, and although I think the cases which have been cited do not clearly support that remark of his, I think that there is some ground for saying that where the sum of money in question has been deposited, that is a circumstance which must be taken into account by a judge in ascertaining the intention of the parties. As to the exact words used in agreements as to the sum being regarded as liquidated damages, and not as a penalty, it has been laid down that judges ought to disregard the expression "liquidated damages" although it has been knowingly used by the parties. I am not going to shut my eyes to that, but I think the expression was only to be disregarded in plain cases where the plain intention of the parties to be gathered from all the circumstances was that the sum was to be a penalty. That is not the case here, and so I cannot see why I should not give the words of the contract their plain meaning. Those words are "the said deposit shall be forfeited to the company as and by way of liquidated and ascertained damages."

It is said that I must say that this sum was a penalty because of the use of the word "forfeit." In my opinion the use of that word does not take away the significance from the plain language of the parties. I hold, therefore, that the plaintiff has forfeited this sum of 300 l., and that the defendants are entitled to judgment. *Judgment for the defendants.*

KEMBLE *v.* FARREN.

Common Pleas, 1829. 6 Bing. 141.

TINDAL, C. J. This is a rule which calls upon the defendant to show cause why the verdict, which has been entered for the plaintiff for 750 l., should not be increased to 1000 l.

The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing October, 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden; and the plaintiff agreed to pay the defendant £3 6s. 8d. every night on which the theatre should be open for theatrical performances, during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfill the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged in the declaration was, that the defendant refused to act during the second season, for which breach, the jury, upon the trial, assessed the damages at 750 l., which damages the plaintiff contends ought by the terms of the agreement to have been assessed at 1000 l.

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1000 l. should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1000 l. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they

may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3 l. 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant it must have been contended that the clause in question, in either case, would have given the stipulated damages of 1000 l. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of Astley v. Weldon, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of 200 l., to be recovered in his Majesty's Courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages; there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which

do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged. *Rule discharged.*

WILLSON *v.* MAYOR OF BALTIMORE.

Maryland, 1896. 83 Md. 203.

Appeal from a *pro forma* judgment of the Court of Common Pleas of Baltimore City, sustaining a demurrer to plaintiff's declaration.

McSHERRY, C. J. The mayor and city council of Baltimore, through the commissioners of public schools, advertised for sealed proposals for furnishing the schools of the city with desks and other necessary appliances. The bids were required to be made out upon forms which contained various stipulations. Among these, it was provided that "the full name and address of a surety must be written on the proposal, and each proposal must be accompanied by a certified check for five hundred dollars, * * * said check to be payable to the mayor and city council of Baltimore. If the successful bidders enter into contract, with bond, without delay, their checks will be returned, as will those of the unsuccessful bidders. No proposal will be entertained which does not comply with the terms hereof." The appellant filled out one of these forms, specified the prices at which he would furnish the needed supplies, gave the name and address of his surety, and enclosed his certified check for $500, payable to the appellee. His bid being the lowest, he was awarded the contract; but, through no fault of his own, and though he acted in entire good faith, he was unable, in spite of his efforts, to furnish the signature of the surety he had named in his bid, and he failed, without being at all to blame, to secure any other surety on his bond. Thereupon the commissioners readvertised for bids, these being obtained and accepted. The new bids were for sums much less than those named by the appellant in his bid, and in consequence the city not only lost no money by the failure of the appellant to furnish a bond and to fulfill his contract, but in fact saved a considerable amount. The appellant then demanded the return of the $500 which he had deposited with his bid, but the city refused to surrender the money, and claimed the right to hold it. Suit was thereafter brought by him against the city for the recovery of the $500 deposited. * * *

On the part of the appellant it is insisted that the $500 deposit was designed to be, and in reality was, a penalty, while on the part of the city it is claimed that the sum named was intended to be, and in fact was, liquidated or stipulated damages, which, for any breach of the appellant's bid or proposal, was to be retained by the city, without reference to whether the city had actually sustained any injury or not. The distinction between a penalty and liquidated damages is of the utmost importance, and upon the decision in any given case between them depends the question whether a sum stipulated to be paid upon a breach of the contract shall be treated as a debt, to be arbitrarily enforced, without regard to the actual loss, or whether, on the other hand, it shall be discarded, to let in an inquiry as to the extent of the damage really sustained in consequence of an omission or refusal to perform the agreement. If the sum designated is held to be liquidated damages, the only evidence necessary to warrant a recovery of that particular amount is that the contract to which it relates has been broken. But, if the sum is regarded as a mere penal sum, its place in the contract gives it no weight, and a recovery for a breach of the undertaking will be limited to the extent of the loss or injury actually sustained and proved. In one instance, therefore, the whole of the sum is recoverable, when there has been a default, though the actual damages be nominal, while in the other only such damages as have been really incurred, and are satisfactorily shown, can be assessed and awarded for a breach. It is obvious, then, that the pending controversy turns upon the question whether the $500 deposit is liquidated damages, or a penalty. If it be the former the plaintiff has no right to recover it back, but if it be the latter the city cannot lawfully retain it, except to the extent that actual damage has been sustained. * * * It is equally well settled that a sum, if it be at all reasonable, and is stipulated to be paid as liquidated damages for the breach of a contract, will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are wholly uncertain, and cannot be ascertained upon an issue of fact. A common instance is the case of agreements between professional men, binding a retiring partner, or an apprentice or clerk, not to interfere with the business of the other. But a stipulation to pay a specified sum upon the nonperformance of a contract is regarded as a penalty, rather than

as liquidated damages, if the intention of the parties as to its effect is at all doubtful, or is of equivocal interpretation. * * * And such a stipulation is generally regarded as a penalty, in the absence of a clear indication of a contrary intention by the parties at the time the contract was executed, where the agreement is certain, and the damages for a breach thereof are easily and exactly ascertainable. Burrell v. Daggett, 77 Me. 545; Brown v. Bellows, 4 Pick., 179. Finally, the tendency of late years has been to regard the statements of the parties as to liquidated damages in the light of a penalty, unless the contrary intention is unequivocally expressed, so that harsh provisions will be avoided, and compensation alone will be awarded. Gammon v. Hone, 14 Maine 250; Leggett v. Ins. Co., 53 N. Y. 394.

Now, it will be observed that the contract between the appellant and the appellee, evidenced by the bid filed and accepted, has not a word in it descriptive of the $500 deposit as either liquidated damages or a penalty. It is clear, therefore, that the parties themselves have not, by any term or povision of the agreement, declared that the deposit shall be either the one or the other, but have left the question at large; and it is equally clear that there is nothing in the subject-matter of the agreement which imperatively requires that the deposit be characterized as liquidated damages, especially as the decided inclination of the court, in doubtful cases even, is to treat the stipulated sum as merely a penalty. Indeed, there is no explicit forfeiture of the deposit at all. The contract provides simply that "if the successful bidders enter into contract, with bond, without delay, their checks will be returned;" but it is nowhere expressly declared that a failure to enter into bond shall entitle the city to the whole amount of the deposit, or to any part of it, though it is palpably implied that so much of it as will be a just compensation for any loss that may result to the city from the failure of the bidder to furnish the bond was, in view of the whole subject-matter, designed by the parties to be applied by the city to its own reimbursement. But beyond this, the exact amount of loss which would result to the city by the failure of a bidder to give the required bond is capable of definite ascertainment. A failure to give the bond is a breach of the contract, and the damages which would result from that breach would be the amount the city paid, if anything, in excess of the

amount of the unexecuted bid, and also the expenses of a readvertising for new bids. These elements of damage are neither uncertain, nor difficult of ascertainment by a jury, and this fact is one of the recognized tests resorted to for distinguishing between liquidated damages and a penalty. Geiger v. Railroad Co., 41 Md. 4. Not only, then, is there no provision expressly declaring this deposit to be liquidated damages, but to treat it as such would require the superaddition, by implication, of a distinct term to the contract, which is not permissible, and the reversal of the doctrine that courts lean strongly against upholding a specified sum as liquidated damages where such an interpretation is of doubtful accuracy and leads to manifest injustice. That an interpretation which treats this deposit as liquidated damages would, to say the least, be of doubtful accuracy, cannot be disputed. That it would be unjust, in this particular case, in its results, is scarcely open to discussion. The appellant is conceded to have acted in perfect good faith. The city has not only not lost anything by his failure to give the bond, but it has actually gained thereby a considerable sum; and it would be unconscionable (Cutler v. How, 8 Mass. 257) under these conditions, for it to retain the $500 as stipulated and liquidated damages for a technical breach which has occasioned no appreciable injury. We discover nothing on the face of the contract, nothing in all the surrounding circumstances on the subject-matter, and nothing in the rules of law, which will justify us in holding this deposit to be liquidated damages, unless the remaining proposition to be considered sustains the appellee's contention. That proposition is that where a sum is deposited, either with a third person, or with the other party to the contract, it is invariably treated as liquidated damages; and the cases of Wallis v. Smith, 21 Ch. Div. 250, Hinton v. Sparkes, L. R. 3 C. P. 161, and some others, have been referred to. * * * These cases, and others to which allusion might be made, relate to a different class of contracts. Where parties contract, as they frequently do by a condition of sale, that the deposit money shall be forfeited if the purchaser fail to carry out his contract, the deposit cannot, nor can any part of it, be recovered back on the ground that the forfeiture was in the nature of a penalty, and the actual loss to the vendor was less than the amount of the deposit. In fact, the cases distinguishing between a penalty and liquidated damages do not apply to

a pecuniary deposit, which is in reality not a pledge, but a payment in part of the purchase money, Wood, Mayne, Dam. § 245; Sugd. Ven. & Pur. c. 1, §§ 3, 18. * * *

It is stated with great clearness and accuracy by Mr. Brantly, in his admirable work on the Law of Contract (page 192), that, "when it is provided that the sum deposited in part performance of the contract is to be forfeited upon failure of the party to complete it, such sum, if not excessive, is liquidated damages." Conversely, if the deposit be not made in part performance of the contract, but be collateral to the contract, and a mere guaranty that its provisions will be observed, and if the making of the deposit is not a part of the thing to be done under or in execution of the contract, but is required simply and solely as a condition precedent to entering into the contract, which distinctly relates to something else, then, obviously, such a deposit would not be treated as liquidated damages merely because it is a deposit, but would be either liquidated damages, or a penalty, as the rules applicable to such a question might cause the court to determine.

We are not prepared to expand the doctrine relating to deposits made on the purchase of land by applying it to contracts of the character now before us. The deposit in the case at bar, when made, was not part of a sum ultimately payable, under the contract, to the city by the appellant, nor was it set apart, either in express terms or impliedly, to meet an obligation arising out of a purchase; but it was designed to serve precisely the same purpose that a guaranty or other indemnity would have done,—to save the city harmless from any actual loss which might arise or grow out of a failure on the part of a bidder to furnish a bond conditioned for the performance of his accepted proposal. It would introduce a sweeping departure from established principles to hold, as an unbending rule applicable alike to all contracts, no matter what their nature or subject, that a deposit made to secure their due performance must invariably be treated as liquidated damages, and never as a penalty. Such a rule would, in its application, ignore or arbitrarily override all other principles of interpretation, and would force courts to regard as liquidated damages sums which obviously would not, according to the canons of construction to which we have alluded, ordinarily be so considered. * * *

Finally it was insisted that when an agreement is in the al-

ternative—to do some particular thing or to pay a given sum of money—the court will hold the party failing to have had his election, and compel him to pay the money. Railroad Co. v. Reichert, 58 Md. 278, and Sedg. on Dam. § 423, were relied on to support this doctrine. The case in 58 Md. certainly does lay down the rule contended for, but the state of facts to which the rule was there applied is totally different from the facts of this case. There Reichert owned a coal yard, and a trestle connecting it with a railroad. Another railroad company, needing part of his land for the construction of its road, condemned it. The construction of its road required that the trestle should be removed. The jury of condemnation awarded $600 damages, and further awarded that the condemning road should erect for Reichert another trestle, and then provided in the inquisition that upon its failure to comply it should pay the further sum of $1,500. This inquisition was accepted by both parties, and was ratified by their consent. The railroad company then neglected to build the trestle, and Reichert brought suit. This court held that the award of $1,500 was not a penalty; that the jury of inquisition had fixed the sum to be paid if the company failed to construct the trestle; and that the alternative thus given and accepted by the agreement of the parties bound the company to perform the conditions upon which it took Reichert's property, or to pay the sum which the jury fixed, and the parties agreed to, in lieu of a compliance with the inquisition. There is in the pending case no alternative agreement at all,—certainly no express or unequivocal one; and, before the doctrine sanctioned in 58 Md. can be applied, there must, by sheer construction, be imported into the proposal or bid which the appellant made a term that is not there now,—a stipulation either to sign the bond with a surety, or to pay $500. For the purpose of declaring the deposit to be liquidated damages, the contract actually made would have to be changed into a totally different agreement. This, of course, cannot be done. * * *

Judgment reversed with costs above and below and new trial awarded.

CAESAR *v.* RUBINSON.

New York, 1903. 174 N. Y. 492.

O'BRIEN, J. This was an action to recover a sum of money which was deposited with the defendants under the following circumstances and conditions: On the 27th of January, 1899, the defendants entered into a written agreement with certain persons, named Goldberg and Goldstein, which took the form of a lease, whereby the defendants, as landlords, undertook to erect upon their lands in the city of New York a three-story brick building, containing stores and a dance hall, with gallery, and lodge and meeting rooms. Goldberg and Goldstein, on their part agreed to take possession as tenants of the property as soon as the premises were ready for use and occupation, which was to be not later than March 1, 1900, and to continue in possession for a term of 10 years. They were to pay an annual rental of $3,300, in monthly payments of $275 on the 1st day of each month. There was no provision in the lease for any security for the payment of the rent, or for the carrying out of the agreement on the part of the owners, but the instrument contained the following provisions: "The said tenants shall deposit, and have deposited, with said landlords the sum of one thousand dollars, the receipt whereof is hereby acknowledged, as security for the faithful performance of this agreement on their part, and in case of any breach thereof by said tenants said amount shall be paid and retained by said landlords as liquidated damages for such breach, but in case the actual damages suffered by said landlords through such breach shall be greater than said sum of one thousand dollars then said sum shall be applied on account of such damage and said tenants be still liable for the balance thereof. Interest at the rate of six per cent. shall be paid and allowed by the landlords to the tenants on said sum of one thousand dollars from the beginning of the term, such interest to be deducted from the monthly rent to be paid as hereinbefore provided; and that this agreement and all covenants thereunder shall be well and faithfully kept and performed by said tenants, then said sum shall be held by said landlords, and shall be applied in part payment of the rent for the last four months of the term hereinbefore provided for. * * * The said landlords do hereby covenant that said tenants on paying the said yearly rent and on performing the conditions and

covenants hereinbefore provided for shall and may peaceably and quietly have, hold and enjoy the said demised premises for the time aforesaid. And in case said landlords shall fail to erect said buildings hereinbefore provided for, then said landlords shall pay to said tenants the sum of one thousand dollars in addition to the deposit to be returned as the agreed, settled, and liquidated damages." Everything appears to have been carried out in the first instance according to the agreement. The building was erected, and the tenants took possession of the same, continued to occupy the premises, and to pay rent until about the 1st of May, 1901, at which time they defaulted in the payment of $45 of the rent for the previous month. Thereupon the defendants, as landlords, instituted summary proceedings against the tenants under the statute, and dispossessed them. The tenants subsequently assigned to this plaintiff the $1,000 which had been deposited pursuant to the provisions of the lease; and this action was commenced to recover that amount, less the $45, balance of rent unpaid at the time the tenants were dispossessed. At the trial, judgment was directed in favor of the plaintiff; but the Appellate Division, upon appeal, by a divided court, reversed the judgment and granted a new trial.

The principal question involved upon this appeal is whether the $1,000 deposited by the tenants as above set forth is to be regarded, under the circumstances, as liquidated damages which the landlords were entitled to retain upon entering into possession of the demised premises. The circumstance that the deposit is described in the lease as liquidated damages for a breach of the agreement is not at all conclusive. The character of the deposit—whether liquidated damages or a penalty—depends upon the intention of the parties, as disclosed by the situation and by the terms of the instrument. The deposit is not necessarily to be regarded as liquidated damages, although it is expressly so stated in the instrument. Whether it is that or a penalty depends upon the nature of the transaction and the intention of the parties. This has been frequently held in the case of an ordinary lease, and where the amount was largely out of proportion to the damages suffered by the breach of the lease. Chaude v. Shepard, 122 N. Y. 397. A provision in a contract such as that now under consideration will be treated as liquidated damages only in those cases where from the nature of the transaction, the actual damages consequent upon a breach of

the contract are incapable of accurate measurement, or where the sum specified in the instrument is not out of all proportion to any damages which could possibly arise from a breach. In the cases where these general features do not exist, the tendency of the courts is to treat the stipulation not as providing for liquidated damages, but in the nature of a penalty. Where the language of such a provision specifying the amount of damages to be paid in case of a breach of the contract is clear and explicit to that effect, the amount is to be deemed liquidated damages when the actual damages contemplated at the time the agreement was made are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss. Curtis v. Van Bergh, 161 N. Y. 47; Ward v. Hudson River Bldg. Co., 125 N. Y. 230.

The only breach of the lease which the defendants assert as a ground for retaining the deposit is the omission of the tenants to pay the $45 of the monthly rent. In all other respects the covenants of the lease were kept and performed. In order to uphold the judgment, we must hold that it was the intention of the parties when making the contract that for such a breach the entire deposit was to be forfeited to the landlords. There is no inherent difficulty in measuring the legal damages which the landlord sustained in a case where the tenant omits to pay the rent, and is for that reason dispossessed. The rule of damages in such cases is quite well settled. It is not claimed in this case that the landlords sustained any other damages beyond the loss of the rent, and that was allowed at the trial and deducted from the deposit. In the absence of anything in the record to the contrary, the presumption is that the landlord resumed the possession of the demised premises, or relet them for the same or for a larger rental; and, if so, it is difficult to see why he should be entitled to have the leased premises and the deposit at the same time. He was not bound to take possession, but could have exhausted the deposit by applying it upon the arrears of rent from time to time as it fell due. But having elected to re-enter, it would seem to be unjust to permit him to have the use of the premises, and the deposit of $1,000 besides, especially where there is no claim that any damages were sustained beyond the loss of the unpaid rent. This is therefore a case where

the damages sustained by reason of the breach of the lease in the failure to pay the stipulated rent could have been easily ascertained; and, when ascertained, it is out of all proportion to the deposit retained under the claim that it was liquidated damages. It is declared by the stipulation in the lease that the amount specified therein should not be regarded as liquidated damages if the landlord's loss exceed that sum, but in such event it should be applicable upon the actual damages, whatever they were found to be. It is difficult to believe that the parties intended that the deposit should have one character as to the landlord, and another character as to the tenant; that as to the former it was not liquidated damages, but was as to the latter. A provision in a lease in regard to liquidated damages, such as the one in question, that is not mutually binding on both parties, should not be enforced against one of them unless the facts and circumstances are such as to make it entirely clear that such was the purpose of the stipulation. I am unable to distinguish this case in principle from those in which this court has passed upon provisions of a similar character in leases or agreements between landlord and tenant. Chaude v. Shepard, *supra*; Scott v. Montells, 109 N. Y. 1. In these cases it was held that the deposit was intended as security for the performance of the covenants of the lease, and not as liquidated damages.

The entry of the landlord under the warrant issued upon the judgment in the proceedings to dispossess the tenants for failure to pay the $45 canceled the lease, and annulled the relation of landlord and tenant. When the landlord elected to assert that right, he waived all claim to the deposit, except so far as it was necessary to apply it in payment of rent then due or accrued. Code Civ. Proc. § 2253; 2 Taylor's Landlord & Tenant, § 725.

If these views are correct, it follows that the landlord was not entitled, under the circumstances of this case, to retain the deposit. The order of the Appellate Division should therefore be reversed, and the judgment of the trial court affirmed, with costs.

Parker, C. J., and Gray, Martin, Vann, Cullen, and Werner, JJ., concur.

Order reversed, etc.

"Mere inequality," say Lord Chief Justice ELDON, in Astley v. Weldon, 2 Bros. & P. 346, "is not ground of relief; the inequality must be so gross that a man would start at the bare mention of it."

"If a party agrees to pay £1000 on several events, all of which are

capable of accurate valuation, the sum must be construed as a penalty and not as liquidated damages." Baron PARKE in Atkins v. Kinnier, L. R. 4 Exch. 776.

"Courts of justice will not recognize or enforce a contract, or any stipuation of a contract, clearly unjust and unconscionable." CHRISTIANCY, J. in Jaquith v. Hudson, 5 Mich. 123.

"A sum, if it be at all reasonable, and is stipulated to be paid as liquidated damages for the breach of a contract, will be regarded as such, and not as a penalty, where, from the nature of the covenant, the damages arising from its breach are wholly uncertain, and cannot be ascertained upon an issue of fact." MCSHERRY, C. J. in Willson v. Baltimore, 83 Md. 203.

In an action on a replevin bond it was held by PETERS, J. in Wyman v. Robinson, 73 Me. 394, that when the damages exceed the penalty of the bond, the recovery may exceed the penalty so far as to include interest.

The amount of damages may be fixed by the parties in advance. The court will look into the question whether it is liquidated damages. "The name by which it is called is of but slight weight." Kunkle v. Wherry, 189 Pa. 198.

See also, on the subject of penalty and liquidated damages, Burgoon v. Johnson, 194 Pa. 61; Watson v. Russell, 149 N. Y. 388; Emery v. Boyle, 200 Pa. 249.

"If the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty though agreed to be paid in the form of a contract."—Lord ELDON, C. J. in Astley v. Weldon, 2 Bos. & P. 346.

Clauses of liquidation will be sustained if limited to breaches that are of an uncertain nature and amount. Donovan v. Hananer, 32 Utah 317.

Though the word penalty is used in the contract, and a single act is forbidden, still, if upon a breach it is not possible to estimate the damages, the sum named may be regarded as liquidated damages. Robinson v. Centenary Fund, 68 N. J. L. 723.

"Where one party to a contract is himself responsible, in whole or in part for a delay in completion at the date fixed by the contract, the provision for liquidated damages is abrogated, the question becomes one of completion within a reasonable time * * * and actual damages only can be recovered."—DOWLING, J. in Holland Torpedo Boat Co. v. Nixon, 61 Misc. 469.

"Although parties in express and explicit terms provide that the sum agreed to be paid shall be liquidated damages, and not a penalty, the courts have held, notwithstanding such an expression of intent that the sum was a penalty." City of New Britain v. New Britain Tel. Co. 74 Conn. 326.

8. *Prospective Damages.*

BOWERS *v.* MISSISSIPPI & R. R. BOOM CO.

Minnesota, 1899. 78 Minn. 398.

The defendant, in 1887, placed certain piling in the river opposite plaintiff's farm, which turned the current from its natural course and upon plaintiff's land, washing away the shores. The plaintiff brought an action in 1895, and recovered a judgment, which was satisfied. In that action prospective damages were not claimed nor assessed. Four more acres since that time have been washed away, and this action was brought in 1899 to recover damages therefor.

START, C. J. * * * The plaintiff was bound to recover in his first action all the damages which he was entitled to; and if he was then entitled to recover for all injuries, past, present, and future, to his land, by reason of the acts of the defendant in placing and maintaining the piling in the river, the judgment in the prior action is a bar to this one; for the plaintiff, if such were the case, could not split up his cause of action, and recover a part of his damages in the first action and then bring this action for the rest of them. The defendant claims that the first action was just such a case, and that the trial court correctly held the judgment to be a bar.

The test, whether an injury to real estate by the wrongful act of another is permanent in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act. (Citing authorities.) * * *

The adjudged cases are agreed as to the abstract rule that, where the injury wholly accrues and terminates when the wrongful act causing it is done, there can be but one action for the redress of the injury. But, where the injury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of the damages as they accrue. In the application of the rule, however, the authorities are somewhat conflicting.

Fortunately, we are relieved from any uncertainty as to the

application of the rule to the facts of this case by the decisions of this court; for they conclusively establish the proposition that the acts of the defendant, in placing and maintaining the piling in the river, whereby the water, logs, and ice were driven upon the shore of the plaintiff's land, were in the nature of a continuing trespass or nuisance, and that successive actions may be brought for the damages as they accrue. * * *

The act of the defendant in the case at bar, in placing and maintaining the piling in the river was, whatever it may have been as to the public, as to the plaintiff a continuing trespass or nuisance, and he was entitled to bring successive actions to recover his damages as they accrued. It follows that the trial court erred in holding the former judgment a bar.

Order reversed and a new trial granted.

CEIGLER *v.* HOPPER-MORGAN CO.

New York, 1904 90 App. Div. 379.

STOVER, J.: The action is one of negligence, and is brought by the father to recover for the loss of services of an infant son.

The son was, at the time of the accident, fifteen and one-half years old, and was engaged in operating a machine which was used for cutting pads. A knife was put in motion by throwing the machinery in gear, and when once in motion, would descend and do its work. The claim is that the machine was out of repair; that the knife was not stopped when it had performed its work, but was operated the second time, and came in contact with the hand of the boy so as to cut off his hand at the wrist.

The judgment must be reversed for errors committed at the trial. The trial judge, after discussing the right of the plaintiff to recover at all in the action, charged the jury upon the question of damages as follows:

If you reach the question of damages, the question of the amount that the father can recover for the loss of the services of the son, you can allow to the father, the plaintiff in this case, all the actual loss sustained by reason of this injury to the child, and illness, including his own services in taking care of him, his neglect of business in consequence of the child's illness, and the necessary charges for medical services, medicine, nursing, and all the necessary expenses and loss incurred, as the natural and approximate result of the injury; and also his prospective

loss by being deprived of the child's services during the remainder of his minority, as well as the probable prospective loss from being compelled to support the child in consequence of the injury."

The defendant's counsel excepted to this portion of the charge, and the court remarked, "That is broad enough to cover my charge. I charged what I understood to be the general rule." So the court distinctly charged that the plaintiff was entitled to recover for the maintenance of the child after he became twenty-one years of age.

The court may have been led into this error by assuming that the obligation was upon the parent to support the child who was unable to support himself. But if the plaintiff's son has been injured, the son would have a right of action against the defendant, and be entitled to recover in his action for the injury he has sustained; and in that recovery would be included the damages by reason of the loss of the arm. One of the circumstances which would tend to increase the damages would be that he would be unable to work and support himself, and a money judgment would be awarded for that element of it.

The father would not ordinarily be bound to support the young man after his arrival at twenty-one years of age, and it might be that the young man would be self-supporting, notwithstanding the loss of his arm, and, without proof of his financial condition in this action, it could not be assumed that the father would have to maintain him.

It was also error, we think, to charge that the father could recover for his loss of time, for his own services in taking care of the child, and also for neglect of business in consequence of the child's illness. (Barnes v. Keene, 132 N. Y. 13.)

There was no proof as to the amount of loss to his business, and such proof would have been inadmissible in any event.

As the case must be reversed for these errors, we do not discuss the other questions raised upon the appeal.

All concur.

Prospective damages to be recoverable must be such as it is reasonably certain will result from the injury. Filer v. N. Y. C. R. R. 49 N. Y. 42.

Prospective damages are allowed for continuing nuisances, trespasses and torts generally. Lahr v. Metropolitan R. R. 104 N. Y. 268; Uline v. R. R. Co. 101 N. Y. 98.

Prospective damages can be awarded for loss of income from professional sources. Rowley v. London & N. W. R. R. Co. 1873, 8 Exch. 221. See also 2 K. B. 1904, 250.

Damages may be awarded in a judicial proceeding for detriment resulting after commencement thereof; and no supplemental pleading is necessary to support such a recovery. Hicks v. Drew, 117 Cal. 305.

There can be a recovery for such pain and inconvenience as is reasonably certain in the future. Ayres v. D. L. & W. R. R. 158 N. Y. 254. And they must be limited by the court, in its charge to such as are reasonably certain. Penn. Coal Co. v. Files, 65 Ohio, 403. So an injury to plaintiff's wife such as to deprive the husband of prospective offspring. Butler v. Manhattan R. R. 143 N. Y. 417.

Damages may be awarded for probable future pain and loss. Norfolk Ry. Co. v. Spraetey, 103 Va. 379.

Future medical expenses can be recovered. Webster v. Seattle Ry. Co. 42 Wash. 364; Hickey v. Welch, 91 Mo. App. 4.

Prospective mental suffering is also an element in damages. Nichols v. Brabazon, 94 Wis. 549.

A parent can recover for the prospective value of the services of a boy eight years old. Drew v. Sixth Av. R. R. Co. 26 N. Y. 49; Similarly for the continuous loss of services of a minor child. Dollard v. Roberts, 130 N. Y. 364.

Wherever the injury is permanent, prospective damages are allowed. Ridenhour v. Kansas City R. R. 102 Mo. 270. See also McConnell v. Corona City Water Co. 149 Cal. 60.

Where, at the trial, it appears that the plaintiff has not recovered from her injuries, it is proper to instruct the jury as to future suffering; and a charge that the jury should consider such future suffering and loss of health is not erroneous.—Chicago & M. El. R. R. v. Ullrich, 213 Ill. 170.

III. DIRECT AND CONSEQUENTIAL DAMAGES.

HADLEY *v.* BAXENDALE.

King's Bench, 1854. 9 Exchequer Reports, 341.

The first count of the declaration stated, that, before and at the time of the making by the defendants of the promises hereinafter mentioned, the plaintiffs carried on the business of millers and mealmen in co-partnership, and were proprietors and occupiers of the City Steam-Mills, in the city of Gloucester, and were possessed of a steam-engine, by means of which they worked said mills, and therein cleaned corn, and ground the same into meal, and dressed the same into flour, sharps, and bran, and a certain portion of the said steam-engine, to wit, the crank shaft of the said steam-engine, was broken and out of repair, whereby the said steam-engine was prevented from working, and the plaintiffs were desirous of having a new crank shaft made for the said mill, and had ordered the same of certain persons trading under the name of W. Joyce & Co., at Greenwich, in the county of Kent, who had contracted to make the said new shaft for the plaintiffs; but before they could complete the said new shaft it was necessary that the said broken shaft should be forwarded to their works at Greenwich, in order that the said new shaft might be made so as to fit the other parts of the said engine which were not injured, and so that it might be substituted for the said broken shaft; and the plaintiffs were desirous of sending the said broken shaft to the said W. Joyce & Co. for the purpose aforesaid; and the defendants, before and at the time of the making of the said promises were common carriers of goods and chattels for hire from Gloucester to Greenwich, and carried on such business of common carriers, under the name of "Pickford & Co.;" and the plaintiffs, at the request of the defendants, delivered to them as such carriers the said broken shaft, to be conveyed by the defendants as such

carriers from Gloucester to the said W. Joyce & Co., at Greenwich, and there to be delivered for the plaintiffs on the second day after the day of such delivery, for reward to the defendants; and in consideration thereof the defendants then promised the plaintiffs to convey the said broken shaft from Gloucester to Greenwich, and there on the said second day to deliver the same to the said W. Joyce & Co. for the plaintiffs. And although such second day elapsed before the commencement of this suit, yet the defendants did not nor would deliver the said broken shaft at Greenwich on the said second day, or to the said W. Joyce & Co. on the said second day, but wholly neglected and refused so to do for the space of seven days after the said shaft was so delivered to them as aforesaid.

The second count stated, that, the defendants being such carriers as aforesaid, the plaintiffs at the request of the defendants, caused to be delivered to them as such carriers the said broken shaft, to be conveyed by the defendants from Gloucester aforesaid to the said W. Joyce & Co., at Greenwich, and there to be delivered by the defendants for the plaintiffs, within a reasonable time in that behalf, for reward to the defendants; and in consideration of the premises in this count mentioned, the defendants promised the plaintiffs to use due and proper care and diligence in and about the carrying and conveying the said broken shaft from Gloucester aforesaid to the said W. Joyce & Co., at Greenwich, and there delivering the same for the plaintiffs in a reasonable time then following for the carriage, conveyance, and delivery of the said broken shaft as aforesaid; and although such reasonable time elapsed long before the commencement of this suit, yet the defendants did not nor would use due or proper care or diligence in or about the carrying or conveying or delivering the said broken shaft as aforesaid, within such reasonable time as aforesaid, but wholly neglected and refused so to do; and by reason of the carelessness, negligence, and improper conduct of the defendants, the said broken shaft was not delivered for the plaintiffs to the said W. Joyce & Co., or at Greenwich, until the expiration of a long and unreasonable time after the defendants received the same as aforesaid, and after the time when the same should have been delivered for the plaintiffs: and by reason of the several premises, the completing of the said new shaft was delayed for five days, and the plaintiffs were prevented from working their said steam-

mills, and from cleaning corn, and grinding the same into meal, and dressing the meal into flour, sharps, or bran, and from carrying on their said business as millers and mealmen for the space of five days beyond the time that they otherwise would have been prevented from so doing, and they thereby were unable to supply many of their customers with flour, sharps, and bran during that period, and were obliged to buy flour to supply some of their other customers, and lost the means and opportunity of selling flour, sharps, and bran, and were deprived of gains and profits which otherwise would have accrued to them, and were unable to employ their workmen, to whom they were compelled to pay wages during that period, and were otherwise injured, and the plaintiffs claim 300 l.

The defendants pleaded *non assumpserunt* to the first count; and to the second payment of 25 l. into Court in satisfaction of the plaintiffs' claim under that count. The plaintiffs entered a *nolle prosequi* as to the first count; and as to the second plea, they replied that the sum paid into Court was not enough to satisfy the plaintiffs' claim in respect thereof; upon which replication issue was joined.

At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which their mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of 2 l. 4 s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its

delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with 25 l. damages beyond the amount paid into Court.

Whateley, in last Michaelmas Term, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Keating and Dowdeswell (Feb. 1) showed cause. The plaintiffs are entitled to the amount awarded by the jury as damages. These damages are not too remote, for they are not only the natural and necessary consequence of the defendants' default, but they are the only loss which the plaintiffs have actually sustained. The principle upon which damages are assessed is founded upon that of rendering compensation to the injured party. This important subject is ably treated in Sedgwick on the Measure of Damages. And this particular branch of it is discussed in the third chapter, where, after pointing out the distinction between the civil and the French law, he says, page 64; "It is sometimes said, in regard to contracts, that the defendant shall be held liable for those damages only which both parties may fairly be supposed to have at the time contemplated as likely to result from the nature of the agreement, and this appears to be the rule adopted by the writers upon the civil law." In a subsequent passage he says, "In cases of fraud the civil law made a broad distinction" (page 66); and he adds, that "in such cases the debtor was liable for all the consequences." It is difficult, however, to see what the ground of such principle is, and how the ingredient of fraud can affect the question. For instance, if the defendants had maliciously and fraudulently kept the shaft, it is not easy to see why they should have been liable for these damages, if they are not to be held so where the delay is occasioned by their negligence only. In speaking of the rule respecting the breach of a contract to transport goods to a particular place, and in actions brought on agreements for the sale and delivery of chattels, the learned author

lays it down, that "In the former case, the difference in value between the price at the point where the goods are and the place where they were to be delivered, is taken as the measure of damages, which, in fact, amounts to an allowance of profits; and in the latter case, a similar result is had by the application of the rule, which gives the vendee the benefit of the rise of the market price. (Page 80.) The several cases, English as well as American, are there collected and reviewed. [PARKE, B. The sensible rule appears to be that which has been laid down in France, and which is declared in their code—Code Civil, liv. iii. tit. iii. ss. 1149, 1150, 1151, and which is thus translated in Sedgwick, page 67: "The damages due to the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is only liable for the damages foreseen, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of non-performance of the contract, resulting from the fraud of the debtor, the damages only comprise so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the non-performance of the contract."] If that rule is to be adopted, there was ample evidence in the present case of the defendants' knowledge of such a state of things as would necessarily result in the damage the plaintiffs suffered through the defendants' default. The authorities are in the plaintiffs' favor upon the general ground. In Nurse v. Barns, 1 Sir T. Raym. 77, which was an action for the breach of an agreement for the letting of certain iron mills, the plaintiff was held entitled to a sum of 500 l., awarded by reason of loss of stock laid in, although he had only paid 10 l. by way of consideration. In Borradaile v. Brunton, 8 Taunt. 535; 2 B. Moo. 582, which was an action for the breach of the warranty of a chain cable that it should last two years as a substitute for a rope cable of sixteen inches, the plaintiff was held entitled to recover for the loss of the anchor, which was occasioned by the breaking of the cable within the specified time. [ALDERSON, B. Why should not the defendant have been liable for the loss of the ship? PARKE, B. Sedgwick doubts the correctness of that report. The learned Judge has frequently observed of late

that the 8th Taunton is of but doubtful authority, as the cases were not reported by Mr. Taunton himself. MARTIN, B. Take the case of the non-delivery by a carrier of a delicate piece of machinery, whereby the whole of an extensive mill is thrown out of work for a considerable time; if the carrier is to be liable for the loss in that case, he might incur damages to the extent of 10,000 l. PARKE B., referred to Everard v. Hopkins, 2 Bulst. 332.] These extreme cases, and the difficulty which consequently exists in the estimation of the true amount of damages, supports the view for which the plaintiffs contend, that the question is properly for the decision of a jury, and therefore that this matter could not properly have been withdrawn from their consideration. In Ingram v. Lawson, 6 Bing. N. C. 212, the true principle was acted upon. That was an action for a libel upon the plaintiff, who was the owner and master of a ship, which he advertised to take passengers to the East Indies; and the libel imputed that the vessel was not seaworthy, and that Jews had purchased her to take out convicts. The Court held, that evidence showing that the plaintiff's profits after the publication of the libel were 1500l. below the usual average, was admissible, to enable the jury to form an opinion as to the nature of the plaintiff's business, and of his general rate of profit. Here, also, the plaintiffs have not sustained any loss beyond that which was submitted to the jury. Bodley v. Reynolds, 8 Q. B. 779, and Kettle v. Hunt, Bull, N. P. 77, are similar in principle. In the latter, it was held that the loss of the benefit of trade, which a man suffers by the detention of his tools, is recoverable as special damage. [PARKE, B. Suppose, in the present case, that the shaft had been lost, what would have been the damage to which the plaintiffs would have been entitled?] The loss they had sustained during the time they were so deprived of their shaft, or until they could have obtained a new one. In Black v. Baxendale, 1 Exch. 410, by reason of the defendant's omission to deliver the goods within a reasonable time at Bedford, the plaintiff's agent, who had been sent there to meet the goods, was put to certain additional expenses, and this Court held that such expenses might be given by the jury as damages. In Brandt v. Bowlby, 2 B. & Ad. 932, which was an action of assumpsit against the defendants, as owners of a certain vessel, for not delivering a cargo of wheat shipped to the plaintiffs, the cargo reached the port of discharge

but was not delivered; the price of the cargo at the time it reached the port of destination was held to be the true rule of damages. "As between the parties in this cause," said Parke, J., "the plaintiffs are entitled to be put in the same situation as they would have been in, if the cargo had been delivered to their order at the time when it was delivered to the wrong party; and the sum it would have fetched at that time is the amount of the loss sustained by the non-performance of the defendants' contract." The recent decision of this Court, in Waters v. Towers, 8 Exch. 401, seems to be strongly in the plaintiffs' favor. The defendants there had agreed to fit up the plaintiffs' mills within a reasonable time, but had not completed their contract within such time; and it was held that the plaintiffs were entitled to recover, by way of damages, the loss of profit upon a contract they had entered into with third parties, and which they were unable to fulfill by reason of the defendants' breach of contract. [PARKE, B. The defendants there must of necessity have known that the consequence of their not completing their contract would be to stop the working of the mill. But how could the defendants here know that any such result would follow?] There was ample evidence that the defendants knew the purpose for which this shaft was sent, and that the result of its non-delivery in due time would be the stoppage of the mill; for the defendants' agent, at their place of business, was told that the mill was then stopped, that the shaft must be delivered immediately, and that if a special entry was necessary to hasten its delivery, such an entry should be made. The defendants must, therefore, be held to have contemplated at the time what in fact did follow, as the necessary and natural result of their wrongful act. They also cited Ward v. Smith, 11 Price, 19; and Parke, B., referred to Levy v. Langridge, 4 M. & W. 337.

Whateley, Willes, and Phipson, in support of the rule (Feb. 2). It has been contended, on the part of the plaintiffs, that the damages found by the jury are a matter fit for their consideration; but still the question remains, in what way ought the jury to have been directed? It has been also urged, that, in awarding damages, the law gives compensation to the injured individual. But it is clear that complete compensation is not to be awarded; for instance, the non-payment of a bill of exchange might lead to the utter ruin of the holder, and yet such damage could not be considered as necessarily resulting from the

breach of contract, so as to entitle the party aggrieved to recover in respect of it. Take the case of the breach of a contract to supply a rick-cloth, whereby and in consequence of bad weather the hay, being unprotected, is spoiled, that damage would not be recoverable. Many similar cases might be added. The true principle to be deduced from the authorities upon this subject is that which is embodied in the maxim: *"In jure non remota causa sed proxima spectatur."* Sedgwick says, page 38, "In regard to the quantum of damages, instead of adhering to the term compensation, it would be far more accurate to say, in the language of Domat, which we have cited above, 'that the object is to discriminate between that portion of the loss which must be borne by the offending party and that which must be borne by the sufferer.' The law in fact aims not at the satisfaction but at a division of the loss." And the learned author also cites the following passage from Broom's Legal Maxims: "Every defendant," says Mr. Broom, "against whom an action is brought experiences some injury or inconvenience beyond what the costs will compensate him for." Broom's Legal Maxims, p. 95; Davies v. Jenkins, 11 M. & W. 755. Again, at page 78, after referring to the case of Flureau v. Thornhill, 2 W. Blac. 1078, he says, "Both the English and American Courts have generally adhered to this denial of profits as any part of the damages to be compensated, and that whether in cases of contract or of tort. So, in a case of illegal capture, Mr. Justice Story rejected the item of profits on the voyage, and held this general language: Independent, however, of all authority, I am satisfied upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. The subject would be involved in utter uncertainty. The calculation would proceed upon contingencies, and would require a knowledge of foreign markets to an exactness, in point of time and value, which would sometimes present embarrassing obstacles; much would depend upon the length of the voyage, and the season of arrival, much upon the vigilance and activity of the master, and much upon the momentary demand. After all, it would be a calculation upon conjectures, and not upon facts; such a rule therefore has been rejected by Courts of law in ordinary cases, and instead of deciding upon the gains or losses of parties in particular cases, a uniform inter-

est has been applied as the measure of damages for the detention of property." There is much force in that admirably constructed passage. We ought to pay all due homage in this country to the decisions of the American Courts upon this important subject, to which they appear to have given much careful consideration. The damages here are too remote. Several of the cases which were principally relied upon by the plaintiffs are distinguishable. In Waters v. Towers, 1 Exch. 401, there was a special contract to do the work in a particular time, and the damage occasioned by the non-completion of the contract was that to which the plaintiffs were held to be entitled. In Borradaile v. Brunton, 8 Taunt. 535, there was a direct engagement that the cable should hold the anchor. So, in the case of taking away a workman's tools, the natural and necessary consequence is the loss of employment: Bodley v. Reynolds, 8 Q. B. 779. The following cases may be referred to as decisions upon the principle within which the defendants contend that the present case falls: Jones v. Gooday, 8 M. & W. 146; Walton v. Fothergill, 7 Car. & P. 392; Boyce v. Bayliffe, 1 Camp. 58, and Archer v. Williams, 2 C. & K. 26. The rule, therefore, that the immediate cause is to be regarded in considering the loss, is applicable here. There was no special contract between these parties. A carrier has a certain duty cast upon him by law, and that duty is not to be enlarged to an indefinite extent in the absence of a special contract, or of fraud or malice. The maxim "*dolus circuitu non purgatur*," does not apply. The question as to how far liability may be affected by reason of malice forming one of the elements to be taken into consideration, was treated of by the Court of Queen's Bench in Lumley v. Gye, 2 E. & B. 216. Here the declaration is founded upon the defendants' duty as common carriers, and indeed there is no pretence for saying that they entered into a special contract to bear all the consequences of the non-delivery of the article in question. They were merely bound to carry it safely, and to deliver it within a reasonable time. The duty of the clerk, who was in attendance at the defendants' office, was to enter the article, and to take the amount of the carriage; but a mere notice to him, such as was here given, could not make the defendants, as carriers, liable as upon a special contract. Such matters, therefore, must be rejected from the consideration of the question. If carriers are to be liable in such a case as this, the exercise of a sound judgment

would not suffice, but they ought to be gifted also with a spirit of prophecy. "I have always understood," said Patteson, J., in Kelly v. Partington, 5 B. & Ad. 651, "that the special damage must be the natural result of the thing done." That sentence presents the true test. The Court of Queen's Bench acted upon that rule in Foxall v. Barnett, 2 E. & B. 928. This therefore is a question of law, and the jury ought to have been told that these damages were too remote; and that, in the absence of the proof of any other damage, the plaintiffs were entitled to nominal damages only: Tindall v. Bell, 11 M. & W. 232. Siordet v. Hall, 4 Bing. 607, and De Vaux v. Salvador, 4 A. & E. 420, are instances of cases where the Courts appear to have gone into the opposite extremes—in the one case of unduly favoring the carrier, in the other of holding them liable for results which would appear too remote. If the defendants should be held responsible for the damages awarded by the jury, they would be in a better position if they confined their business to the conveyance of gold. They cannot be responsible for results which, at the time the goods are delivered for carriage, are beyond all human foresight. Suppose a manufacturer were to contract with a coal merchant or mine owner for the delivery of a boat load of coals, no intimation being given that the coals were required for immediate use, the vendor in that case would not be liable for the stoppage of the vendee's business for want of the article which he had failed to deliver: for the vendor has no knowledge that the goods are not to go to the vendee's general stock. Where the contracting party is shown to be acquainted with all the consequences that must of necessity follow from a breach on his part of the contract, it may be reasonable to say that he takes the risk of such consequences. If, as between vendor and vendee, this species of liability has no existence, *a fortiori* the carrier is not to be burthened with it. In cases of personal injury to passengers, the damage to which the sufferer has been held entitled is the direct and immediate consequence of the wrongful act. *Cur. adv. vult.*

The judgment of the Court was now delivered by

ALDERSON, B. We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and in Blake v. Midland Railway Company, 21 L. J., Q. B. 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at *Nisi Prius*.

"There are certain established rules," this Court says, in Alder v. Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: —Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach

of contract. It is said, that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have

flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances which, perhaps would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

DUBUQUE WOOD AND COAL ASSOC. *v.* DUBUQUE.

Iowa, 1870. 30 Ia. 176.

Action at law. The petition avers, that, prior to the date when plaintiff's cause of action accrued, there had been erected and maintained a bridge on Seventh street in the city of Dubuque over a slough of the Mississippi River; that Seventh street was a highway leading from the business portion of the city to the levee upon the river, and, as such, was used by the public; that said bridge was a county bridge, and it was the duty of the city as well as the county to rebuild it after it became impassable; that before the bridge became impassable, a large quantity of wood being deposited upon the levee, as was customary, was purchased by plaintiff for the purpose of reselling to its customers in the city of Dubuque; that the levee was liable to be overflowed by the river, and the street upon which the bridge in question was erected was the only way over which the wood could have been transported to plaintiff's customers. On account of the bridge becoming impassable, and of the negligence of defendants, in failing to rebuild it, plaintiff was unable to remove his wood. Subsequently, but prior to any repairs made upon the bridge, the wood was lost by a flood in the river. The defendants provided no other bridge or way while the bridge in question was unfit for use, by which plaintiff could have removed the wood.

The defendants separately demurred to the petition, alleging that it exhibited no cause of action, and each claiming not to be liable upon the state of facts set out in the petition. The demurrers were sustained and plaintiff appeals.

BECK, J. It is not denied, by the appellees, that the injury

complained of will support an action, unless the injury appears to be public in its nature, and the damage claimed too remote, under the rules of the law, to become the basis of a compensatory judgment. The liability of the county and city for damage, the direct and certain result of negligence in failing to repair a highway, when that duty is imposed upon them, is not questioned by the counsel of appellees.

The questions presented for our determination, in this case, are these: 1. Are the injuries set out in the petition, as the foundation of the action, of such a public nature, being shared by plaintiff with the public generally, that recovery therefor is precluded? 2. Is the damage claimed so remote that compensation, under the rules of law, will not be given? 3. If the action can be maintained, may recovery be had against both of the defendants? If not against both, which one is liable? No other points are presented in the argument of counsel for our decision.

As our conclusions upon the second point above stated are decisive of the case, it will be unnecessary to examine the others.

The rule limiting the recovery of damage to "the natural and proximate consequence of the act complained of" is universally admitted, and the extreme difficulty in its practical application is quite as widely conceded. The difficulty results not from any defect in the rule, but in applying a principle, stated in such general language, to cases of diverse facts. The dividing line between proximate and remote damages is so indistinct, if not often quite invisible, that there is, on either side, a vast field of doubtful and disputed ground. In exploring this ground there is to be had but little aid from the light of adjudicated cases. The course followed in each case, which is declared to be upon one side or the other of the dividing line, is plainly marked out, but no undisputed landmarks are established by which the dividing line itself may be precisely traced. As so little aid is derived from precedents in arriving at the conclusion we have reached, it would prove quite useless to refer to them.

Damage to be recoverable must be the proximate consequence of the act complained of; that is, it must be the consequence that follows the act, and not the secondary result from the first consequence, either alone or in combination with other circumstances.

An illustration will serve the purpose of more clearly ex-

pressing the principle. An owner of lumber deposited upon the levee of the city of Dubuque, exposed to the floods of the river, starts with his team to remove it. A bridge built by the city which he attempts to cross, from defects therein falls, and his horses are killed. By the breaking of the bridge and the loss of his team, he is delayed in removing his property. On account of this delay his lumber is carried away by the flood and lost. The proximate consequence of the negligence of the city is the loss of his horses. The secondary consequence, resulting from the first consequence, is the delay in removing the lumber, which finally, caused its loss. Damage on account of the first is recoverable, but for the second, is denied.

Applying these principles to the case before us, we conclude that the losses for which recovery is sought were not the proximate consequence of the negligence of defendants complained of in the petition. The proximate consequence of the bridge of defendants becoming impassable was not the loss of plaintiff's wood. The loss resulted from the flood. It does not appear from the petition that the negligence of defendants in failing to repair the bridge, whereby plaintiff was prevented removing the wood, exposed plaintiff to any other loss. All that can be said is, that defendants' negligence caused plaintiff to delay removing the wood; the delay exposed the wood to the flood, whereby it was lost. Plaintiff's damage, then, was not the proximate consequence of the acts of defendant complained of, but resulting from a remote consequence joined with another circumstance, the flood. The case is not distinguishable from the supposed case above stated.

In our opinion the demurrer was correctly sustained. The other points raised in the case need not be noticed.

Affirmed.

LAWRENCE *v.* HAGERMAN.

Illinois, 1870. 56 Ill. 68.

SCOTT, J. * * * The action is founded in tort, for maliciously suing out the process of a court. The averment in the declaration is, that the appellant "wrongfully, unjustly, and maliciously, and without probable cause therefor," sued out a writ of attachment under the attachment act, and with a malicious and wrongful purpose caused the same to be levied on

the goods and chattels of the appellee. It is alleged that, by reason of the premises, the appellee sustained special damage in the depreciation of the value of the property levied on, and in the expenditure of large sums of money in the defence of the action, and, as general damage, that his business was broken up, his credit and reputation impaired and destroyed.

The testimony offered to which objections were interposed tended to show, negatively at least, that there was no probable cause for suing out the writ. This was a material averment and it was necessary to be proven. The evidence offered for that purpose was legitimate and proper.

The main objection taken is to the evidence offered to establish the measure of damages. It seems to us that the averments in the declaration are broad and comprehensive enough to admit of evidence of all the injuries sustained in consequence of the wrongful act alleged. For the purpose of estimating the extent and magnitude of the injury, the court permitted the appellee to introduce evidence of the nature, character, and amount of business transacted at and before the date of the wrongful levy, and also evidence of the complete destruction of that business, and of the extent to which the credit and financial reputation of the appellee were impaired, and also evidence of the actual loss of the stock levied on, and of the expenses incurred in and about the defense of the suit. No reason is perceived why these facts do not constitute proper elements for the consideration of a jury in estimating the damages occasioned by the tortious act of the appellant. The evidence was pertinent to the issue made by the pleadings, and the issue stated was broad enough to admit the proof.

In actions on the case the party injured may recover from the guilty party for all the direct and actual damages of the wrongful act and the consequential damages flowing therefrom. The injured party is entitled to recover the actual damages and such as are the direct and natural consequence of the tortious act.

In this instance the amount of money actually paid out in and about the defense of the suit, and the depreciation of the value of the stock on which the wrongful levy is alleged to have been made, are not the only damages sustained, if the appellant wrongfully, unjustly, and maliciously and without probable cause sued out the writ of attachment, and caused the same to

be levied in the manner charged. The business of the appellee had hitherto been prosperous, his credit and financial reputation good, and all were destroyed by the malicious act of the appellant, if it be conceded that he was guilty as alleged. It cannot be said that the law will afford no redress for the destruction of financial credit and reputation, or mete out no measure of punishment to the guilty party who wantonly and maliciously destroys them. The reputation and credit of a man in business is of great value, and is as much within the protection of the law as property or other valuable rights. And if it be true that the appellant has maliciously, by his wrongful act, destroyed the business, credit, and reputation of the appellee, the law will require him to make good the loss sustained. Chapman v. Kirby, 49 Ill. 211.

The instructions given for the appellee announce these principles with sufficient accuracy. The jury were correctly told that in estimating the damages they might take into consideration any injury shown by the evidence that the appellee sustained in his business and reputation, together with the losses actually sustained by the wrongful suing out of the writ of attachment. The jury were also instructed that they were not confined to the actual damages, if the wrongful acts were wantonly and maliciously committed, but they might give exemplary damages. Such is the well-established rule of the law. * * *

We entertain no doubt, upon principle and upon authority, that an action on the case for maliciously and without probable cause, suing out a writ of attachment, is maintainable for the injury of the business, credit and reputation of the defendant, notwithstanding the statute has required the plaintiff to give a bond, conditioned to pay all damages that may be occasioned by the wrongful suing out of the writ. * * *

The judgment must be affirmed.

McHOSE *v.* FULMER.

Pennsylvania, 1873. 73 Pa. 365.

The cause of action was on a note given on purchase of pig iron. Defendants claim that by the refusal of the plaintiffs to furnish the iron as per contract, they (the defendants) have suffered damage in an amount exceeding the whole amount of the note for which suit is brought.

SHARSWOOD, J. When a vendor fails to comply with his contract, the general rule for the measure of damages undoubtedly is, the difference between the contract and the market price of the article at the time of the breach. This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself, the rule does not apply, for the reason of it ceases: Bank of Montgomery v. Reese, 2 Casey, 143. "It is manifest," says Mr. Chief Justice Lewis, "that this (the ordinary measure) would not remunerate him when the article could not be obtained elsewhere." If an article of the same quality cannot be procured in the market, its market price cannot be ascertained, and we are without the necessary *data* for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manufacture, by having to use an inferior article or not receiving the advance on his contract price upon any contracts which he had himself made in reliance upon the fulfilment of the contract by the vendor. We do not mean to say, that if he undertakes to fill his own contracts with an inferior article, and in consequence such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. His legitimate loss is the difference between the contract price he was to pay to his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfilment of the contract. The affidavits of defense are not as full and precise upon this point as they might and ought to have been, but they state that the defendants below had entered into such contracts, and that they were unable to get the same quality of iron which the plaintiff had agreed to deliver, and this, we think, was enough to have carried the case to a jury. *Judgment reversed, and a procedendo awarded.*

BROWN *v.* CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY.

Wisconsin, 1882. 54 Wis. 342.

TAYLOR, J. In this case we deem it material to determine whether the action is an action for a tort, or an action for a breach of the contract to carry the plaintiffs to their destination, because we think the rules of damages in the two actions are essentially different. We hold that the action in this case is based upon the tort of the defendant in negligently and carelessly directing the plaintiffs to leave the cars before they reached their destination.

The plaintiffs claim, and the evidence shows, that they and their child, about seven years old, were directed to leave the cars, by the brakeman, at a place some three miles east of Mauston, being told at the time that it was Mauston, their place of destination. When they left the cars it was night; it was cloudy, and had rained the day before; there was a freight train standing on a side track where they were put off the train; there was no platform, and no lights visible except those on the freight train. Plaintiffs soon ascertained that they were not at Mauston, and did not know where they were. They did not see the station-house, although there was one, but it was hid from their view by the freight train standing on the side track. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to the bridge, about a mile east of Mauston, and then they thought it easier to go on to Mauston than seek shelter at the house, which was a considerable distance from the track. They went on to Mauston, and arrived there late at night, Mrs. Brown quite exhausted from the walk. She was pregnant at the time. She had severe pains during the night, and the pains continued from time to time, and after a few days she commenced flowing. The pains and flowing continued until some time in December, when a miscarriage took place, after which inflammation set in, and for some time she was so sick that she was in imminent danger of dying. The plaintiffs claim that the miscarriage and subsequent sickness were all caused by the walk

Mrs. Brown was compelled to take to get from the place where they were left by the train to Mauston.

The important question in the case is, whether the appellant is liable for the injury to Mrs. Brown, admitting that it was caused by her walk to Mauston. Whether the sickness of Mrs. Brown was caused by the walk to Mauston was an issue in the case, and the jury have found upon the evidence that it was caused by the walk. There is certainly some evidence to sustain this finding of the jury, and their finding is therefore conclusive upon this point. Admitting that the walk caused the miscarriage and sickness of the plaintiff Mrs. Brown, it is insisted by the learned counsel for the appellant, that the appellant is not liable for such injury; that it is too remote to be the subject of an action; that the negligence and carelessness of the defendants' employees in putting the plaintiffs off the cars at the place they did, was not the proximate cause of the miscarriage and sickness, and for that reason the appellant company is not liable therefor. * * *

The rule as to what damages may be recovered in actions for breach of contract, is laid down by this court in the case of Candee v. W. U. Tel. Co., 34 Wis. 479, cited from Hadley v. Baxendale, 9 Exch. 341, and approved. * * *

The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is, that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. (Citing authorities.) * * *

As stated by Justice Colt in the case of Hill v. Winsor, 118 Mass. 251: "It cannot be said, as a matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence."

In the case of Bowas v. Pioneer Tow Line, *supra*, Judge Hoffman, speaking of the rule in relation to damages on a breach of

contract, as contrasted with the rule in case of wrong, says: "The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes, when the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties, and may be recovered by the defendant. But this rule, as Mr. Sedgwick remarks, has no application to torts. He who commits a trespass must be held to contemplate all damage which may legitimately flow from his illegal act, whether he may have foreseen them or not; and so far as it is plainly traceable, he must make compensation for it."

The justice and propriety of this rule are manifest, when applied to cases of direct injury to the person. If one man strike another, with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual, can make no difference. If the wrong-doer should in fact intend but slight injury, and deal a blow which in ninety-nine case in a hundred would result in a trifling injury, and yet by accident produce a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrong-doer from the consequences of his act. The real question in these cases is, Did the wrongful act produce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the act of the party giving the blow is unlawful, renders him liable for all its direct evil consequences.

This was the substance of the decision in the old and often cited squib case of Scott v. Shepherd, 2 W. Bl. 892. Justice Nares there says that, "the act of throwing the squib being unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate;" and in this view of the case all the judges agreed, although they differed upon the question as to the form of the action.

In the case at bar, the question to be determined is, whether the negligent act of the defendants' employees in putting the plaintiffs and their child off the train in the night-time, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote

cause for which no action lies. We must, in considering this case, take it for granted that the walk from the place where they left the cars to Mauston was the immediate cause of the injury complained of. We think the question whether there was any negligence on the part of the plaintiffs in taking the walk, was properly left to the jury, as a question of fact; and they found that they were guilty of no negligence on their part. They found themselves placed by the wrongful act of the defendant where it became necessary for their protection to make the journey. The fact that there was a station-house near by, at which they might have found shelter until another train came by, is not conclusive that the plaintiffs were negligent in the matter. They were landed at a place where they could not see it, and the jury have found that under the circumstances they were not guilty of negligence in not finding it. The defendant must therefore be held to have caused the plaintiffs to make the journey as the most prudent thing for them to do under the circumstances. And, we think, under the rules of law, the defendant must be liable for the direct consequences of the journey. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was no shelter, in a cold and stormy night, and, on account of the state of health of the parties, in their attempts to find shelter they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. The wrongful act of the defendant would be the natural and direct cause of their deaths, and it would seem to be a lame excuse for the defendant, that, if the plaintiffs had been of more robust health, they would not have perished or have suffered any material injury.

The defendant is not excused because it did not know the state of health of Mrs. Brown, and is equally responsible for the consequences of the walk as though its employees had full knowledge of that fact. This court expressly so held in the case of Stewart v. Ripon, 38 Wis. 591, and substantially in the case of Oliver v. Town of La Valle, 36 Wis. 592.

Upon the findings of the jury in this case, it appears that the defendant was guilty of wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the

defendant's wrongful act; and that, on account of the peculiar state of health of Mrs. Brown at the time, she was injured by such walk. There was no intervening independent cause of the injury, other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think, therefore, it must be held that the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury, within the decisions above quoted. We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act, or results from the act of the party in endeavoring to escape from the immediate danger.

When by the negligence of another a person is threatened with danger, and he attempts to escape such threatened danger by an act not culpable in itself under the circumstances, the person guilty of the negligence is liable for the injury received in such attempt to escape, even though no injury would have been sustained had there been no attempt to escape the threatened danger. This was so held, and we think properly, in the case of a passenger riding upon a stage-coach, who supposing the coach would be overturned, jumped therefrom and was injured, although the coach did not overturn, and would not have done so had the passenger remained in his seat. The passenger acted upon appearances, and, not having acted negligently, it was held that he could recover; it being shown that the coach was driven negligently at the time, which negligence produced the appearance of danger, Jones v. Boyce, 1 Stark. 493. The ground of the decision is very aptly and briefly stated by Lord Ellenborough in the case as follows: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

So, in the case at bar, the defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause; and it is its

proximate cause, within the rules of law upon that subject. The true meaning of the maxim, *causa proxima non remota spectatur*, is probably as well defined by the late Chief Justice Dixon in the case of Kellogg v. Railway Co., 26 Wis. 223, as by any other judge or court. He states it as follows: "An efficient, adequate cause being found, must be considered the true cause, unless some other cause not incident to it, but independent of it, is shown to have intervened between it and the result." * * *

There is, I think, but one case cited by the learned counsel for the appellant which appears to be in direct conflict with this view of the case, except those which relate to breaches of contract, and that is the Pullman Palace Car Co. v. Barker, 4 Col. 344. This case is, we think, unsustained by authority, and is in direct conflict with the decisions of this court in the cases of Stewart v. Ripon and Oliver v. Town of La Valle, *supra*. This decision is, it seems to me, supported by the principles of neither law nor humanity. It in effect says that, if an individual unlawfully compels a sick and enfeebled person to expose himself to the cold and storm to escape worse consequences from his wrongful act, he cannot recover damages from the wrong-doer, because it was his sick and enfeebled condition which rendered his exposure injurious. Certainly such a doctrine does not commend itself to those kinder feelings which are common to humanity, and I know of no other case which sustains its conclusions.

It is said by the Supreme Court of the United States in M. & St. P. Railway Co. v. Kellogg, (94 U. S. 475):

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it." * * *

BY THE COURT.—*The judgment of the Circuit Court is affirmed.*

COLE, C. J. and LYON, J. *dissent.*

WOOD *v.* PENNSYLVANIA R. CO.

Pennsylvania, 1896. 177 Pa. 306.

DEAN, J. We take the facts, as stated by the court below, as follows: On the 26th of October, 1893, the plaintiff, hav-

ing bought a return ticket, went as a passenger upon the railroad of the defendant company from Frankfort to Holmesburg. After spending the day there, attending to some matters of business, he concluded to come back upon a way train, due at Holmesburg at 5 minutes after 6 in the evening. While waiting for this train, the plaintiff stood on the platform of the station, which was on the north side of the tracks, at the eastern end of the platform, with his back against the wall at the corner. To the eastward of the station, a street crosses the railroad at grade. How far this crossing is from the station does not appear from the evidence. It was not so far away, however, but that persons on the platform could see objects at the crossing. For at least 150 yards to the eastward of the crossing the railroad is straight, and then curves to the right. About 6 o'clock an express train coming from the east upon the north track passed the station, and the plaintiff, while standing in the position described, was struck upon the leg by what proved to be the dead body of a woman, and was injured. The headlight of the approaching locomotive disclosed to one of the witnesses who stood on the platform two women in front of the train at the street crossing, going from the south to the north side of the tracks. One succeeded in getting across in safety, and the other was struck just about as she reached the north rail. How the woman came to be upon the track there is nothing in the evidence to show. There was evidence that no bell was rung or whistle blown upon the train which struck the woman before it came to the crossing, and some evidence that it was running at the rate of from 50 to 60 miles an hour. Upon this state of facts, the trial judge entered a nonsuit. The court in banc, having afterwards refused to take off the nonsuit, we have this appeal.

Was the negligence of defendant the proximate cause of plaintiff's injury? Judge Pennypacker, delivering the opinion of a majority of the court below, concluded it was not, and refused to take off the nonsuit. Applying the rule in Hoag v. Railroad Co., 85 Pa. 293, to these facts, the question on which the case turns is: "Was the injury the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrong-doer as likely to flow from his act?" The rule quoted in Hoag v. Railroad Co., *supra*, is, in sub-

stance, the conclusion of Lord Bacon, and the one given in Broom's Legal Maxims. It is not only the well-settled rule of this state, but is, generally, that of the United States. Prof. Jaggard, in his valuable work on Torts, after a reference to very many of the cases decided in a large number of the states, among them Hoag v. Railroad Co., comes to this conclusion: "It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Jag. Torts, c. 5. Judge Cooley states the rule thus: "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some others, and result, and does actually result, in injury, through the intervention of other causes not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent." Cooley, Torts, 69. This, also, is in substance the rule of Hoag v. Railroad Co. All the speculations and refinements of the philosophers on the exact relations of cause and effect help us very little in the determination of rules of social conduct. The juridical cause, in such a case, as we have held over and over, is best ascertained in the practical affairs of life by the application to the facts of the rule in Hoag v. Railroad Co.

Adopting that rule as the test of defendant's liability, how do we determine the natural and probable consequences, which must be foreseen of this act? We answer in this and all like cases: from common experience and observation. The probable consequence of crossing a railroad in front of a near and approaching train is death, or serious injury. Therefore, acting from an impulse to self-preservation, or on the reflection that prompts to self-preservation, we are deterred from crossing. Our conduct is controlled by the natural and probable consequence of what our experience enables us to foresee. True, a small number of those who have occasion to cross railroads are reckless, and, either blind to or disregardful of consequences, cross, and are injured, killed, or barely escape. But this recklessness of the very few in no degree disproves the foreseeableness of the consequences by mankind generally. Again, the

competent railroad engineer knows from his own experience and that of others in like employment that to approach a grade highway crossing with a rapidly moving train without warning is dangerous to the lives and limbs of the public using the crossing. He knows death and injury are the probable consequences of his neglect of duty; therefore he gives warning. But does any one believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger? The crowded platforms and grounds of railroad stations, generally located at crossings, alongside of approaching, departing, and swiftly passing trains, prove that the public, from experience and observation, do not, in that situation, foresee any danger from trains. They are there because, in their judgment, although it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger. They feel as secure as if in their homes. To them it is no more probable than that a train at that point will jump the track and run over them. If such a consequence as here resulted was not natural, probable, or foreseeable to anybody else, should defendant, under the rule laid down in Hoag v. Railroad Co., be chargeable with the consequence? Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning. As is said in Railroad Co. v. Trich, 117 Pa. 399: "Responsibility does not extend to every consequence, which may possibly result from negligence."

What we have said thus far is on the assumption the accident was caused solely by the negligence of defendant, or by the concurring negligence of defendant and the one killed going upon the track with a locomotive in full view. This being an action by an innocent third person, he cannot be deprived of his remedy because his injury resulted from the concurrent negligence of

two others. He fails because his injury was a consequence so remote that defendant could not reasonably foresee it.

We think the nonsuit was properly entered.

The judgment is affirmed.

In Mann Boudoir Car Co. v. Dupre, 54 Fed. 646, McCormick, Circuit Judge, held that where the misconduct of the carrier's servant to a female passenger *enceinte* was the proximate cause of a miscarriage, the carrier was not excused because he did not understand the physical condition of the lady.

In Chapman v. Kirby, 49 Ill. 210, where a well-established business of plaintiff was broken up by defendant's wrongful act, defendant was held liable for all the losses flowing from it.

A municipal corporation is not responsible for consequential damages caused by negligence in improving a public street. Uppington v. City of New York, 165 N. Y. 222.

For liability in case of consequential damages, see Boehrer v. Juergens, 133 Wis. 426, an action against a manufacturing jeweler to whom jewels had been sent for repair.

For proximate cause see also Laidlaw v. Sage, 158 N. Y. 73; and Kleiner v. Third Ave. R. R. Co. 162 N. Y. 193.

Guille v. Swan, 19 Johns, 381, is a very celebrated case illustrating the doctrine of direct and consequential damages. A balloonist descended near Swan's garden; a crowd assembled out of curiosity and trod on the flowers and plants of plaintiff. A verdict of $90 was sustained, defendant being held as *causa causans*, on the authority of the famous squib case, Scott v. Shepherd, 2 Black. Rep. 892.

In Botkin v. Miller, 190 Mass. 44, the same question of remote damages arose in connection with disorder and injury to plaintiff's barber shop in Boston, on September 14th, 1901, a day kept as a holiday by orthodox Jews. Defendant's business declined but there was no further showing as to the cause of the decline. Held that defendants were not liable for loss of profits. See Crowell v. Moley, 188 Mass. 116.

IV. CERTAINTY.

Contingent, Remote and Speculative Damages.

LOKER *v.* DAMON.

Massachusetts, 1835. 17 Pick. 284.

Trespass *quare clausum.* The declaration set forth, that the defendants destroyed and carried away ten rods of the plaintiff's fences, in consequence of which certain cattle escaped through the breach and destroyed the plaintiff's grass, and that he thereby lost the profits of his close from September, 1832, to July, 1833. A default was entered by agreement. Damages were to be assessed on such principles as the court should determine.

SHAW, C. J. * * * The Court are of opinion, that the direction respecting damages was right. In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open and passes it frequently, and willfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without reparing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed, that as the trespass consisted in removing a few rods of fence, the proper measure of damage was the costs of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not mean to say, that other damages may not be given for injury in

breaking the plaintiff's close, but I mean only to say, that in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages, for that part of the injury which consisted in removing the fence and leaving the close exposed.

Judgment on the default, for the sum of $1.50 damages.

MASTERTON *v.* MOUNT VERNON.

New York, 1874. 58 N. Y. 391.

This action was brought to recover damages for injuries received by plaintiff being thrown from his wagon in one of the streets of the village of Mount Vernon, called Fourth avenue.

The accident was occasioned by the wagon sinking into a ditch or excavation made by the owners of lots upon said street, with the consent of the village trustees.

GROVER, J. * * * I also think the judge erred in overruling the defendant's objection to the following question: About what had been your profits, year by year, in that business? The plaintiff had testified that he was engaged in the tea importing and jobbing business, buying and selling teas, and had been for a great number of years. That he had a partner who attended to the sales, while he made the purchases. That in purchasing teas a high degree of skill was necessary, which the plaintiff possessed. That the business was extensive. That in consequence of the injury the plaintiff could not purchase teas, and there was a great falling off in the business of the firm. In Lincoln v. Saratoga and S. Railroad Co., 23 Wend. 425, it was held, in an analogous case, that the plaintiff might prove that he was engaged in the dry goods business, and its extent, but there was no attempt to prove the past profits of the business, with a view to show what the future would be. Where, in such a case, the plaintiff has received a fixed compensation for his services, or his earnings can be shown with reasonable certainty, the proof is competent. McIntyre v. N. Y. C. R. R. Co., 37 N. Y. 287; Grant v. The City of Brooklyn, 41 Barb. 381. In Nebraska City v. Campbell, 2 Black, 590, it was held that proof that the plaintiff was a physician, and the extent of his practice, was competent. Wade v. Leroy, 20 How. (U. S.) 24, held the same. In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that

the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages. In Walker v. The Erie R. R. Co., 63 Barb. 260, it was held that proof of the amount of income derived by the plaintiff for the year preceding the injury, from the practice of his profession as a lawyer, was competent. This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended. Whether proof of the income derived by a lawyer from the past practice of his profession is competent for the purpose of authorizing the jury to draw an inference as to the extent of the loss sustained by inability to personally attend to business, may, I think, well be doubted. There is no such uniformity in the amount in different years, as a general rule, as to make such inference reliable. But the profits of importing and selling teas are still more uncertain. In some years they may be large, and in others attended with loss. The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures, in which the plaintiff, if uninjured, would have been engaged.

The judgment appealed from should be reversed, and a new trial ordered, costs to abide the event.

All concur.

LILLEY *v.* DOUBLEDAY.

High Court of Justice, 1881. L. R. 7 Q. B. Div. 510.

Motion to enter judgment for the plaintiff pursuant to the findings of the jury. A rule for a new trial, on the ground that the findings were wrong, was disposed of in the course of the argument. The action was to recover the value of certain drapery goods warehoused by the defendant for the plaintiff, which were destroyed by fire. The contract was that the goods should be deposited at the defendant's repository at Kingsland Road, but a portion of them were deposited by the defendant elsewhere,

and a fire occurring they were destroyed. The plaintiff had insured the goods, giving Kingsland Road as the place where they were deposited, and in consequence lost the benefit of the insurance.

Counsel for the plaintiff, contended that there had been a conversion of the goods by the defendant, which entitled the plaintiff to recover their value, and further that, the contract being to keep the goods at Kingsland Road, and that contract having been broken, the defendant took the risk of the loss of the goods on him, and was liable for their value: Davis v. Garrett. (6 Bing. 716).

Counsel for the defendant, contended that there had been no conversion, and that there having been no intention to convert the goods to the defendant's use and nothing to change their quality, the defendant would only be liable in case he did not use reasonable care as a warehouseman: Fouldes v. Willoughby (8 M. & W. 540.); that the damages claimed would be too remote within the rule of Hadley v. Baxendale (9 Ex. 341.), as not being in the contemplation of the parties, and that Hobbs v. London and South Western Ry. Co. (Law Rep 10 Q. B. 111.) was an authority in favor of the defendant. They also referred to Heald v. Carey (11 C. B. 977); Glynn v. East and West India Dock Co. (6 Q. B. D. 475); British Columbia Saw Mill Co. v. Nettleship (Law Rep. 3 C. P. 499).

GROVE, J. I think the plaintiff is entitled to judgment. It seems to me impossible to get over this point, that by the finding of the jury there has been a breach of contract. The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule, is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risk of so doing, except where the risk is independent of his acts or inherent in the property itself. That proposition is fully supported by the case of Davis v. Garrett (6 Bing. 716), which contains very little that is not applicable to this case. It was argued that that case was decided on the ground that the defendant was a common carrier, but that is not the ground of the judgment of Tindal, C. J., who decided that as the loss had

happened while the wrongful act of the defendant was in operation and was attributable to his wrongful act, he could not set up as an answer to the action the bare possibility of the loss if his wrongful act had never been done, and he illustrated the case by saying that a defendant who had by mistake forwarded a parcel by the wrong conveyance, if a loss had thereby ensued, would undoubtedly be liable. I do not give any opinion whether what was done here amounted to a conversion, but I base my judgment on the fact that the defendant broke his contract, by dealing with the subject-matter in a manner different from that in which he contracted to deal with it. The only case that would have made me hesitate is Hobbs v. London and South Western Ry. Co. (Law Rep. 10 Q. B. 111), and that we are told has some doubt thrown on it in a recent case in the Court of Appeal (M'Mahon v. Field, 7 Q. D. p. 591), at all events the doubt induced by the former case is not strong enough to make me alter the opinion I have expressed on this one. There will, therefore, be judgment for the plaintiff.

LINDLEY, J. I am of the same opinion. The plaintiff gave his goods to the defendant to be warehoused at a particular place, the defendant warehoused them elsewhere, where, without any particular negligence on his part, they were destroyed. The consequence is that the plaintiff has a cause of action and is entitled to damages. The question is, what damages? Hadley v. Baxendale (9 Exch. 334) is wide of the mark, because the question here is whether the defendant was responsible for the goods, and if so the damages must be their value. Then, it is further said that the defendant was responsible only for want of reasonable care, but is that so when he has departed from his authority in dealing with the goods? I give no opinion whether there is a conversion of the goods; the question is, what answer has the defendant to the plaintiff who asks for them back. Can he say he will neither return the goods nor pay their value? I think he cannot. The reasoning in Davis v. Garrett (6 Bing. 716) is applicable to this case, and Burrows v. March Gas and Coke Co. (Law Rep. 5 Ex. 67; on appeal, Law Rep. 7 Ex. 96) shows that the damage is not too remote.

STEPHEN, J., concurred:

Judgment for the plaintiff.

HICHHORN *v.* BRADLEY.

Iowa, 1902. 117 Iowa, 130.

Action on account for cigars sold and delivered at an agreed price. Defendant set up, by way of counterclaim, damages sustained through the breach by plaintiff of an agreement which the defendant alleged gave him the exclusive right to sell a certain brand of cigars in certain territory. The defendant by efforts and expenditures had created a demand for the cigars in this territory, when plaintiff refused to furnish any more cigars. The jury returned a verdict for defendant on his counterclaim and the plaintiffs appeal.

McCLAIN, J. * * * The chief contention, however, of counsel for appellants, is that the damages which defendant attempted to show were too remote and speculative to be considered. * * * Here we are not concerned with the question which sometimes arises, whether profits are within the contemplation of the parties, according to the rule of Hadley v. Baxendale, 9 Exch. 341, which has been frequently cited, and has been approved by this court in Mihill's Manufacturing Co. v. Day, 50 Iowa, 250, and other cases. It is perfectly clear in this case that the profits to be derived from the sale of these cigars constituted the only consideration to the defendant for entering into the contract, and that the loss of such profits was in the contemplation of the parties at the time the contract was made as a direct consequence which would result from its breach. And it is well settled that when the loss of future profits is thus in the contemplation of the parties, and does directly result from the breach of the contract, the amount of profits thus lost may be recovered. * * *

The distinction between an erroneous rule of law, sometimes assumed, that prospective profits are not to be considered in measuring damages for breach of contract, and the correct proposition, that remote and speculative profits cannot be shown, for the reason that no sufficient evidence thereof is attainable, is thus stated in U. S. v. Behan, 110 U. S. 338, 344, "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or

grounds of damage, namely: First, what he has already expended towards performance, less the value of materials on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of Masterton v. Mayor, etc., 7 Hill (N. Y.) 69, they are the 'direct and immediate fruits of the contract,' they are free from this objection. They are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements—something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense." [Here the learned justice cites authorities.]

So where an agent contracts to give his entire time to his employer for a compensation to be determined by commissions on sales of goods, his measure of damage for being thrown out of employment under the contract is the value of his time lost, and not the profits which he would have made; the value of his time being a more satisfactory measure than the uncertain and indefinite profits. Machine Co. v. Bryson, 44 Iowa, 159; Wilson Sewing Mach. Co. v. Sloan, 50 Iowa, 367; Brigham v. Carlisle, 78 Ala. 243. These last three cases are especially relied on by appellant, but the present case is plainly distinguishable from them. In those cases there was a measure of damage which could be resorted to for the purpose of giving the injured party relief for breach of contract; and the court in each case thought that this measure was more satisfactory than that to be reached by considering the profits which might have been made by the complaining party, had he been allowed to perform his contract. If the question considered in Machine Co. v. Bryson, *supra*, were now before us for the first time, we might, in view of the later authorities, incline to the view expressed in the dissenting opinion. As supporting that view, see, in addition to cases already cited, Wells v. Association, 99 Fed. 222. But in the case before us there is no such measure of damage available as

was found in the cases relied on by the counsel for appellant. Defendant did not contract to give his entire services to plaintiff in the sale of cigars, nor were his entire earnings dependent on the profits to be made out of this contract. Here it is impossible to estimate his damage by the value of the time lost. Nor is it possible to measure his damage by the labor and expense involved in introducing plaintiffs' cigars to the trade. To some extent, defendant has already been compensated for that labor and expense by the profits derived from the sale of plaintiffs' cigars during the time of the continuance of defendant's agency; and it would be manifestly impossible to determine the proportion of the labor and expense for which he had received compensation, and the proportion for which he was dependent by way of compensation on the profits which should have been derived from future sales which he was not allowed to make. It is well established by the decided preponderance of authority that where future profits are in the contemplation of the parties, and there is no other basis on which damages for breach of contract can be estimated, such profits may be made the basis for the recovery of damages. * * *

In a somewhat similar case (Wakeman v. Manufacturing Co., 101 N. Y. 205), it is said that damages by way of prospective profits "are nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered, because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective, they

must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract." To the same effect, see Schumaker v. Heinemann, 99 Wis. 251. Although such a measure of damages may be unsatisfactory and uncertain, yet, if it is the most satisfactory and certain measure which is attainable, justice is not to be defeated because a better measure is not at hand. "The administration of justice frequently proceeds with reasonable certainty of accomplishing what is right, or as nearly right as human efforts may attain in the face of similar difficulties; and it does so by making the experience of mankind, or, rather, the judgment which is founded upon such experience, the guide." Taylor v. Bradley, 39 N. Y. 129, 144. It seems never to have been held in this state that, where there is no other measure of damages for breach of contract, a contracting party is to be denied any damage because no better measure than the reasonable prospective profits of a business is attainable. We think that it would be manifestly unjust to deny to the defendant in this case any recovery whatever for breach of his contract because the contract itself contemplated and was based upon prospective profits. The evidence introduced did furnish as fair a basis for estimating such profits as could be furnished with reference to the breach of any such contract, and we think it was admissible, and that the court properly submitted it to the jury. Such a contract as we have before us was recognized as valid in Kaufman v. Manufacturing Co., 78 Iowa 679 and Rosenberger v. Marsh, 108 Iowa 47, although the question of measure of damages was not presented in those cases.

Affirmed.

Speculative damages cannot be recovered, as *e. g.*, for failure to receive promotion to a high grade of service in a company that had no fixed rule of promotion. Richmond & W. R. R. Co. v. Elliott, 149 U. S. 266; M. C. R. R. v. Hardy, 88 Miss. 732.

But damages are allowed, if consequential, unless too remote, trivial or uncertain, or unless they result from some justifiable act. Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

For damages that are speculative, remote and contingent, there can be no recovery. Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244. In a contract whereby plaintiff was allowed to saw defendant's logs, speculative damages were refused in an action for breach. Petrie v. Lane, 58 Mich. 527.

Plaintiff can be compensated for all detriment suffered which was proximately caused by defendant's act, but not for damages not clearly ascertainable in their nature and origin. Nothing can be recovered for remote and uncertain damage to health, reputation and feeling. Westwatee v. Grace Church, 140 Cal. 339.

Contingent damages are not allowed. Central Trust Co. v. Clark, 34 C. C. A. 354; Pittsburg R. R. v. Moore, 110 Ill. 304; Shelbourne v. Law Investment Co. 2 Q. B. 1898, 626.

In Ehrgott v. Mayor of New York, 96 N. Y. 264, plaintiff was a book canvasser for D. Appleton & Co., and his earnings were from four to seven thousand dollars per annum. He was injured by a defect in the street. Held, that "the wrongdoer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury."

In Schrandt v. Young, 89 N. W. Rep. 607, plaintiff sued for breach of contract to care for a flock of sheep and receive pay in a share of the increase of the flock. Held, that such damages were not contingent and uncertain; one engaged in such business can, with reasonable accuracy, give the probable increase of a flock of sheep, under certain stated conditions. Contracts for purchase and sale of future crops have been recognized as valid. Blackford v. Packing Co. 76 Cal. 212.

In Curry v. Sandusky Fish Co. 88 Minn. 485, "evidence was received over objection that one sturgeon would produce 16 pounds of caviar; that it was worth 85 cents to $1.25 per pound. This evidence was clearly objectionable."

V. DAMAGES IN ACTIONS ON CONTRACTS.

1. *Contracts Relating to Real Property.*

FLUREAU *v.* THORNHILL.

Common Pleas, 1776. 2 W. Bl. 1078.

The plaintiff bought at an auction a rent of 26 l. 1s. per annum for a term of thirty-two years, issuing out of a leasehold house, which let for 31 l. 6s. The sale was on the 10th of October, 1775. The price at which it was knocked down to him was 270 l., and he paid a deposit of 20 per cent, or 54 l. On looking into the title, the defendant could not make it out; but offered the plaintiff his election, either to take the title with all its faults, or to receive back his deposit with interest and costs. But the plaintiff insisted on a further sum for damages in the loss of so good a bargain; and his attorney swore he believed the plaintiff had been a loser by selling out of the stocks to pay the purchase money, and their subsequent rise between the 3rd and the 10th of November; but named no particular sum. Evidence was given by the defendant, that the bargain was by no means advantageous, all circumstances considered; and the auctioneer proved that he had orders to let the lot go for 250 l. The defendant had paid the deposit and interest, being 54 l. 15s. 6d., into court; but the jury gave a verdict, contrary to the directions of DE GREY, C. J., for 74 l. 15s. 6d., allowing 20 l. for damages.

Davy moved for a new trial, against which Glyn showed cause; and by

DE GREY, C. J. I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost.

GOULD, J., of the same opinion.

BLACKSTONE, J., of the same opinion. These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected. For curiosity, I have examined the prints for the price of stock on the last 3rd of November, when three per cent's sold for 87½. About 310 l. must therefore have been sold to raise 270 l. And if it costs 20 l. to replace this stock a week afterwards (as the verdict supposes), the stocks must have risen near seven per cent in that period, whereas in fact there was no difference in the price. Not that it is material; for the plaintiff had a chance of gaining as well as losing by a fluctuation of the price.

NARES, J., hesitated at granting a new trial; but next morning declared that he concurred with the other judges.

Rule absolute for a new trial, paying the costs.

SYNGE *v.* SYNGE.

L. R. 1894 1 Q. B. 466.

Defendant, in an ante-nuptial agreement, promised to leave by his will a house and lot to plaintiff for life. He did not do so but conveyed his whole estate to third persons. The trial judge gave judgment for the defendant, holding that the letter relied on by the plaintiff did not amount to a contract. The plaintiff appeals.

KAY, L. J. The questions which arise in this case are these:

1. Was there a binding contract?
2. Was it such a contract as could be enforced in equity, or was there a remedy in damages for the breach of it?
3. Has the time arrived at which such remedy can be asserted?
4. If the remedy be by way of damages, what amount of damages should be given?

The action was tried by a judge without a jury, so that all questions, both of fact and law are open on this appeal.

It will be convenient to consider the questions in the order in which they are stated.

The alleged contract is contained in a letter of December 24, 1883, by the defendant to a lady whom he was desirous to marry, and is in these words:

"You my love thoroughly understand the terms (and I daresay have told Mr. Woodruff on which we are to put a stop to all this bother by becoming one another) which are that I leave house and land to you for your lifetime. * * * True it is possible but highly improbable that I might come in for the title and should be much better off. Should such a thing happen we could see what I ought and would do for you."

There seems to be no doubt that the house and land referred to were the house and a small piece of land at Ardfield in Devonshire, worth it is said about 60 l. or 70 l. a year, in which the defendant was then residing with two daughters by a former marriage. The defendant was not then Sir R. Synge. He succeeded to the title afterwards. The lady who is the plaintiff had some property of her own of which Mr. Woodruff was trustee. He was not a solicitor.

The construction of the letter is plain. It is a statement of the "terms" as to property on which the defendant proposed to marry the lady. The marriage took place on January 5, 1884, ten days after the date of the letter.

It is argued that the plaintiff did not understand it to be a binding promise, and did not so treat it. [The judgment then dealt with the evidence, and continued:]

The learned judge who decided this case has held that the letter was not treated by the lady as a contract, although by the advice of Mr. Woodruff she preserved it. The inference, however, that she accepted the terms and married on the faith of the promise in writing seems to us irresistible. We cannot, with deference to the learned judge, agree in his view that she treated the letter as a mere statement of intention by which the intended husband was not to be bound. The law relating to proposals of this kind before marriage was thus stated by Lord Lyndhurst, L. C., in Hammersley v. De Biel, 12 Cl. & F. 45, at p. 78: "The principle of law, at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal."

We are of opinion that the proposal of terms in this case was

made as an inducement to the lady to marry, that she consented to the terms, and married the defendant on the faith that he would keep his word, and that accordingly there was a binding contract on the defendant's part to leave to his wife the house and land at Ardfield for her life.

Then, secondly, what is the remedy? Marriage is a valuable consideration for such a contract of the highest order, and where, as here, the contract is in writing, so that there is no question upon the Statute of Frauds, in the language already quoted, a Court of Equity will take care that the party who marries on the faith of such a proposal "is not disappointed, and will give effect to the proposal."

In Hammersley v. De Biel, *supra*, the proposal was made on behalf of the intended wife's father, by his authority, and was reduced into writing, and was to the effect that the father would pay down 10,000 l., to be settled on the intended husband and wife and their children, the husband to secure a jointure of 500 l. a year to the wife if she survived him; and then followed the provision on which the question arose, by which the father "proposes for the present to allow his daughter 200 l. per annum for her private use, * * * and also intends to leave a further sum of 10,000 l. in his will to Miss Thomson, to be settled on her and her children." After the father's death, without having made the promised provision by will, the only child of the marriage—his mother having died before her father—instituted a suit in equity against his grandfather's executors to recover 10,000 l. out of his assets. Lord Langdale, M. R., held that by acceptance the proposal had "ripened into an agreement," and that the plaintiff was entitled to the relief he prayed —i. e, to the sum of 10,000 l., with interest at 4 per cent from the end of one year after the father's death, on the footing of a legacy. Lord Cottenham, L. C., affirmed this decision, saying this, 12 Cl. & F. 45, at p. 62, n.: "I propose, first, to consider whether there was any such agreement previous to the marriage of the plaintiff's father and mother as was binding on the late Mr. Thomson to give an additional 10,000 l. as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract, such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum, or in the other evidence in the cause, proof of any such contract; and this may have led to

the defense set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required."

This was affirmed in the House of Lords by Lord Lyndhurst, L. C., Lord Brougham, and Lord Campbell, without calling upon the respondents. We have examined the case closely, because it is of the highest authority, not merely as a judgment of the House of Lords, but it was decided by some of the best equity lawyers of that time. Lord St. Leonards has criticized the decision on the ground that the memorandum in that case might have been construed as a mere expression of an intention, not as a definite proposal which could by acceptance ripen into a contract: Sugden's Law of Property, p. 53. But he does not intimate a doubt that the decision was right if the proposal was not merely of an intention which might be changed. Therefore, a definite proposal in writing so as to satisfy the Statute of Frauds, to leave property by will, made to induce a marriage, and accepted, and the marriage made on the faith of it, will be enforced in equity.

Then, what is the remedy where the proposal relates to a defined piece of real property? We have no doubt of the power of the Court to decree a conveyance of that property after the death of the person making the proposal against all who claim under him as volunteers.

It is argued that Courts of Equity cannot compel a man to make a will. But neither can they compel him to execute a deed. They, however, can decree the heir or devisee in such a case to convey the land to the widow for life, and under the Trustee Acts can make a vesting order, or direct that someone shall convey for him if he refuses. And under the like circumstances, the Court has power to make a declaration of the lady's right.

But counsel do not press for such relief, or ask for a declaration to bind the house and land. The relief they ask is damages for breach of contract. It seems to be proved that the grantees of the property under the deeds executed by Sir R. Synge took without notice of the letter; they acquired, as we understand, the legal estate by the grant. If there was any valuable consideration moving from them, no relief in the nature of specific performance could be given against them; and it is suggested that the property, being partly leasehold, according to the decision in Price v. Jenkins, 5 Ch. D. 619, there was such valuable

consideration. It is not necessary to examine this argument, as counsel elect to ask for damages only.

Sir R. Synge had all his lifetime to perform this contract; but, in order to perform it, he must in his lifetime make a disposition in favor of Lady Synge. If he died without having done so, he would have broken his contract. The breach would be omitting in his lifetime to make such a disposition. True, it would only take effect at his death; but the breach must take place in his lifetime, and as by the conveyance to his daughters he put it absolutely out of his power to perform this contract, Lady Synge, according to well-known decisions (Hochster v. De la Tour, 2 E. & B. 678; Frost v. Knight, Law Rep. 7 Ex. 111), had a right to treat that conveyance as an absolute breach of contract, and to sue at once for damages; and as this Court has both legal and equitable jurisdiction, we are of opinion that such relief should be granted.

We have not before us the materials for assessing such damages. The amount must depend on the value of the possible life estate which Lady Synge would be entitled to if she survived her husband. Their comparative ages would, of course, be a chief factor in such a calculation. There must be an inquiry as to the proper amount of damages.

Sir R. Synge must pay the costs of the action here and in the Court below.

Appeal allowed.

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1) Actions Between Landlord and Tenant.

RAYNOR *v.* BLATZ BREWING CO.

Wisconsin, 1898. 100 Wis. 420.

This was an action by the lessee of real estate against his lessor for damages for alleged breach of the covenants of a lease. It appears that about April 1, 1897, the defendant leased to the plaintiff for one year a building in the city of Milwaukee, known as the "People's Theater," to be used as a theater and saloon, at a rental of $200 per month.

Upon the trial, the plaintiff was allowed to prove as a basis for the estimation of damages what his profits had been in the use of the building as a theater and saloon during the several years immediately preceding the year in question and it appeared

that he had operated the theater and saloon upon Sunday as well as upon week days, whereupon, upon the cross-examination, the defendant's attorney endeavored to ascertain from the plaintiff what part of the estimated profits were derived from the Sunday business. After several questions upon this subject, the court made the following ruling, to which the defendant took exception: "I hold the profits which he makes on Sundays is to be included the same as other days, and that the profits which this man made on Sunday in his business are not to be distinguished from the profits he made generally. I will give you the benefit of the exception, and stop the investigation right here as far as the Sunday business is concerned, without holding whether his business is legal or illegal on Sundays or other days. There is a difference between a contract 'made' on Sunday and 'executed' on Sunday. A court held a contract made on Sunday was illegal, but they never held a contract executed on Sunday illegal. The result of that would be in an accounting between partners, or in such business, it would be necessary to eliminate from the business the business done on Sunday, if any of it was done on Sunday. If he is entitled to recover profits, it is immaterial whether they were made on Sunday or any other day, in my judgment." Thereupon no further questions were asked upon this subject. A special verdict was demanded, and the defendant, among other questions, requested that the court submit the following questions as a part of the special verdict: "(7) Did the plaintiff, during the years 1891 and 1895, run his theater and the premises in question on Sundays? (8) If you answer the foregoing interrogatory in the affirmative, was not a large portion of his profit derived from keeping open his theater and premises in question on Sundays? (9) Was a considerable portion of the profits of the plaintiff derived from the sale of liquors in his said theater on Sundays? (10) Is a considerable portion of the anticipated profits claimed by the plaintiff founded on the expected keeping open of said theater on Sundays, and the sale of liquors therein on such days? (17) How much of the anticipated profits claimed by the plaintiff as damages were to be derived from the keeping open of theater on Sundays, and the sale of liquors therein on said days?" The court refused to submit any of these questions, and exceptions were duly taken to such rulings.

WINSLOW, J. (after stating the facts). The verdict in this case justifies the judgment for the plaintiff, and we have discovered

no substantial error in the case save upon the question of the measure of damages. This was undoubtedly a case within the rules laid down in Poposkey v. Munkwitz, 68 Wis. 322, where the law authorizes the recovery of anticipated profits of a business as damages. The loss of such profits in the present case must clearly have been within the contemplation of the parties, and they are not too remote or conjectural, and are capable of being ascertained with reasonable certainty, because the plaintiff had been transacting the same business for years in the building. The evidence, therefore, showing the plaintiff's previous annual profits in this very building while transacting the same business, was properly received as a basis for ascertaining the profits which he might reasonably anticipate during the balance of the year after his practical eviction. But the profits of an unlawful business cannot be any proper basis for the estimate of damages. This would seem to be too clear for argument. The profits made on week days may properly form such basis; but the profits made on Sundays, resulting from a criminal violation of the Sunday law, cannot form any legal basis for the estimate of damages. As well might it be claimed that the profits resulting from operating a gambling hall or a house of ill fame could be used as a basis for damages. To state the proposition is to answer it. The defendant attempted, by cross-examination of the plaintiff, and by a question proposed to be submitted in the special verdict, to ascertain what part of the anticipated profits were based upon the Sunday business; but it was held by the court that the inquiry was immaterial, and we regard the question as properly raised by the exceptions taken to these rulings. Nor was it necessary to raise the question by pleading. The defendant was not required to anticipate that the court would allow evidence of improper elements of damage to be received and go to the jury. It is a question of evidence, and not of pleading. It seems quite certain that the jury took into account the Sunday profits of past years in their estimate of the profits to be anticipated. Certainly, the rulings of the court practically required them to do so. Hence there must be a new trial.

Judgment reversed, and action remanded for a new trial.

EAGAN *v.* BROWNE.

New York, 1908. 128 App. Div. 184.

GAYNOR, J. It was held in Denison v. Ford, 10 Daly, 412, that when a tenant is evicted he cannot sue the landlord for tort, so as to change the rule as to the measure of damages, but only for breach of the covenant of quiet enjoyment which, if not expressed, is implied in leases. But in the later case of Snow v. Pulitzer, 142 N. Y. 263, the tenant was allowed to pass the covenant by and recover as for a tort. In that way he recovered for the breaking up of his business and the loss of property caused thereby. In the present case the tenants hired a floor in a building which was furnished with steam power for business purposes by the landlord, and the lease was in terms not only of such floor, but of the steam power to run the plaintiffs' business. The complaint alleges that the defendants, the subsequent grantees of the lessor, "unlawfully evicted the plaintiffs from the said premises, and the use and enjoyment thereof by wantonly, wilfully and maliciously depriving and cutting off from the plaintiffs' premises and business all the steam power and live steam absolutely necessary for carrying on the said laundry business;" and it is alleged that the plaintiffs' business was thereby broken up and ruined, and they were unable to get another place equipped to carry on their business. The case seems to be the same as that of Snow v. Pulitzer, for the wrongful trespass by removing the support of a side wall which caused it to fall, as was the fact in that case, and the wrongful trespass of disconnecting the shafts in the demised premises from the steam plant in the present case, are the same in principle and cannot be distinguished. Each was a trespass which destroyed the beneficial use for which the premises were leased. The later case of Witherbee v. Meyer, 155 N. Y. 446, is not applicable. There the action was, and only could be, for damages for a breach of covenant in the lease that the water power leased with the grist mill was sufficient to run the mill to its full capacity. It was sufficient to run it, but the complaint was that it was not as great as the lease called for. The rule of damages allowed was the difference between the rental value with the maximum power covenanted for and the power as it was. But suppose the landlord had wrongfully torn down the dam and deprived the tenant of all power? The case would then have been the same as the present one and that of

Snow v. Pulitzer. Moreover loss of profits may be recovered in an action for damages for breach of contract, for there are many exceptions to the general rule which is deemed to be to the contrary, if it were necessary to go into that. Bagley v. Smith, 10 N. Y. 489; Wakeman v. Wheeler & Wilson Co., 101 N. Y. 205; Thomson-Houston Co. v. Durant Co., 144 N. Y. 34, 47.

The judgment should be reversed.

Judgment reversed, and new trial granted; costs to abide the event.

All concur, except HOOKER, J., who dissents.

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2) SALE OF LAND.

McGUCKIN *v.* MILBANK.

New York, 1897. 152 N. Y. 297.

This action was brought to recover damages for an alleged breach of a covenant against incumbrances in a deed.

ANDREWS, C. J. Unless, upon the evidence, the plaintiff was, in any event, entitled to recover, at least, the sum for which the verdict was directed, the direction was erroneous, and the order of the general term must be affirmed, although a case was or might have been made for the recovery of damages to some amount for the breach of the covenant against incumbrances contained in a deed of Cauldwell. The action was brought upon the theory that the Manchester mortgage had not been cut off by the foreclosure of the mortgage under which Cauldwell acquired title, although it was a subsequent lien, and Manchester was made a party defendant to those foreclosures. The defendants, while insisting that the lien of the Manchester mortgage was extinguished by the foreclosures, further contend that although it may have been an outstanding and valid incumbrance on the property at the time of the conveyance by Cauldwell to the plaintiff, and constituted a breach of the covenant against incumbrances contained in Cauldwell's deed, no case was made for the recovery of more than nominal damages. The plaintiff was neither evicted under the Manchester mortgage, nor has he paid the mortgage, or any part of it. It is the general rule that a grantee under a deed containing a covenant against incumbrances, who has not been disturbed in his possession, and who has not paid the mortgage or other money lien on the land,

is not entitled to an action for the breach of the covenant to recover more than nominal damages. This rule was declared with great distinctness in the case of Delavergne v. Norris, 7 Johns. 358, and has been steadily adhered to in this state. The principle of the decision is that a covenant against incumbrances is treated as a contract of indemnity, and although broken as soon as made, if broken at all, nevertheless a recovery (beyond nominal damages) is confined to the actual loss sustained by the covenantee by reason of the payment or enforcement of the incumbrance against the property. He is not permitted to recover the amount of the outstanding incumbrance before payment or loss of the property, although its existence may be an embarrassment to his title, and subject him to inconvenience. The reason for the rule is stated in Delavergne v. Norris: "If the plaintiff, when he sues on a covenant against incumbrances, has extinguished the incumbrance, he is entitled to recover the price he has paid for it. But, if he has not extinguished it, but it is still an outstanding incumbrance, his damages are but nominal, for he ought not to recover the value of an incumbrance on a contingency, where he may never be disturbed by it." The case cited was the case of a mortgage, which could be discharged as of right by a money payment, and where the grantee was in the undisturbed possession of the land. But there is no duty resting upon a covenantee in such a case to pay the incumbrance, as between him and his grantor; and if the title of the covenantee is divested by proceedings *in invitum* based on the incumbrance, without fraud or collusion on his part, then it would seem that whatever damages can arise out of the breach of the covenant had happened, and may be recovered. In the case supposed, the covenantee has lost his property by reason of the incumbrance. It is no longer a contingent or speculative injury, but certain and final to the extent of the value of the interest of which he has been divested.

In the present case, as has been said, the plaintiff neither paid the Manchester mortgage, nor was he evicted under it. * * * His legal injury, under the evidence, could not exceed the loss he sustained on the one lot to which alone he had title at the time of the foreclosure, and not to two lots which the trial judge seems to have assumed he owned at that time. We think the trial court erred in directing a verdict for any specific sum, and that the order of the general term properly granted a new trial.

It is unnecessary to pass upon the other questions argued. The order should be affirmed, and judgment absolute directed. All concur, except MARTIN, J., absent.

Order affirmed, and judgment absolute ordered for defendants, with costs.

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(1) *Breach of Vendor.*

HOPKINS *v.* LEE.

United States Supreme Court, 1821. 6 Wheat. 109.

Error to the Circuit Court for the District of Columbia.

This was an action of covenant, brought by the defendant in error (Lee), against the plaintiff in error (Hopkins), to recover damages for not conveying certain tracts of military lands, which the plaintiff in error had agreed to convey, upon the defendant in error relieving a certain incumbrance held by one Rawleigh Colston, upon an estate called Hill and Dale, and which Lee had previously granted and sold to Hopkins, and for which the military lands in question were to be received in part payment. The declaration set forth the covenant, and averred that Lee had completely removed the incumbrance, from Hill and Dale. The counsel for the plaintiff in error prayed the court to instruct the jury, that in the assessment of damages, they should take the price of the military lands as agreed upon by the parties in the articles of agreement upon which the action was brought, as the measure of damages for the breach of covenant. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted; and a verdict and judgment thereon being rendered for the plaintiff below, the cause was brought by writ of error to this court.

LIVINGSTON, J. * * * In the assessment of damages, the counsel for the plaintiff in error prayed the court to instruct the jury, that they should take the price of the land, as agreed upon by the parties in the articles of agreement upon which the suit was brought, for their government. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court, that in an ac-

tion by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle, whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case. *Judgment affirmed.*

MARGRAF *v.* MUIR.

New York 1874. 57 N. Y. 155.

This action was against the vendor for specific performance of a contract to convey a lot of land, and for damages for breach of the contract in case it could not be specifically performed.

EARL, C. * * * In this case the referee denied the equitable relief, but awarded damages for the breach of the contract, and in this he did not err, provided he adopted the proper rule of damage. The referee allowed the plaintiff as damages the difference between the contract price and the value of the land, thus placing him in the position he would have been if the contract had been performed. In this I think he erred. The general rule, in this State, in the case of executory contracts for the sale of land, is that. in the case of breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase-money, in which case he can also recover such purchase-money and interest. (Mack v. Patchin, 42 N. Y. 167; Bush v. Cole, 28 Id. 261; Pumpelly v. Phelps, 40 Id. 60. See, also, Lock v. Furze, Law Rep. 1 C. P. 441; Engle v. Fitch, Law Rep. 3 Q. B., 314.) But to this rule there are some exceptions based upon the lawful conduct of the vendor, as if he is guilty of fraud or can convey, but will not either from perverseness or to secure a better bargain, or, if he has covenanted to

convey when he knew he had no authority to contract to convey; or, where it is in his power to remedy a defect in his title and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfil his contract. In all such cases, the vendor is liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. Here no fraud was perpetrated on the vendee. He knew that the vendor did not have title to the land, and that she could not convey to him without authority from some court; and he, knowing that the land was worth $2,000, may be presumed to have known that no authority could be obtained to convey the land for $800, without, in some way, practicing an imposition upon the court. This latter knowledge she did not have. Believing, as she did, that $800 was a fair price for the land, she had no reason to doubt that she could obtain authority to convey. Further than this, he knew that the land had been sold for taxes and a lease given. This she did not know. Under these circumstances, she could not get authority from the court to make a conveyance upon behalf of her minor children, and it appears that she could not procure the tax title. Hence there is no ground for imputing to her any blame for not making such a conveyance as her contract called for. These facts do not call for the application of an exceptional rule of damages in this case.

The case of Pumpelly v. Phelps, *supra*, is the widest departure from the general rule of damages in such case that is to be found in the books. In that case it was held, that where the vendor, in an executory contract for the conveyance of land, knew at the time he made the contract that he had no title, although he acted in good faith believing that he could procure and give the purchaser a good title, he was yet liable for the difference between the contract price and the value of the land. But there are two features which distinguish this case from that. In that case the vendee did not know that the vendor had no title. Here he did know it, and he knew, also, that she could get no title without imposing upon some court. Here also, even if she could have procured the authority of some court to convey, she still would have been unable to give such a title as her contract called for, on account of the outstanding tax title which was unknown to her when she contracted and which she could not procure.

The plaintiff agreed, subsequently, to the making of the contract, if defendant would abate $100 from the contract price, that he would, at his expense, conduct the proceedings to procure from the court authority to convey, she co-operating with him, and would take a conveyance subject to the tax title. This did not alter the position of the parties so as to affect this case. She was in no sense culpable in not co-operating with him in imposing upon some court, and, to shield her from the damages claimed in this case, she was not obliged to allow him anything on account of the tax title. I am, therefore, of opinion that the referee erred in the rule of damages applied. The recovery should have been confined to the purchase-money paid (twenty-five dollars) and the interest thereon. * * *

All concur. *Order affirmed and judgment accordingly.*

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a *Breach of Covenant of Title.*

STAATS *v.* TEN EYCK.

New York, 1805. 3 Caines, 111.

On the 7th of January, 1793, the testator, Barent Ten Eyck, by indenture of release, in consideration of £700 granted, bargained, and sold to the plaintiff, and one Dudley Walsh, in fee, two lots of ground in the city of Albany, covenanting, "That he the grantor was the true and lawful owner; that he was lawfully and rightfully seized in his own right of a good and indefeasible estate of inheritance in the premises; that he had full power to sell in fee-simple, and that the grantees should forever peaceably hold and enjoy the premises without the interruption or eviction of any person whatever, lawfully claiming same." In the month of May following, Walsh, for a valuable consideration, conveyed his moiety of these lots to Staats, who, on the 30th of October, 1802, after due possession, by lease and release, granted one of them to Margaret Chim in fee, and covenanted to warrant and defend her in the peaceable possession thereof. In August, 1803, an ejectment was brought against Margaret Chim, in which a judgment was obtained for a moiety of the lot sold to her, execution sued out, and this followed by a recovery in an action for the mesne profits. The value of the lot, from the moiety of which Margaret Chim was thus evicted, was at the time of the sale by Ten Eyck £300, and that was the

consideration paid for it. Margaret Chim, being thus evicted, brought her action against the plaintiff, and recovered for the moiety she had lost.

Upon these facts, which were submitted without argument, the following questions were raised for the determination of the court. 1st. Whether the plaintiff was entitled, under the covenants in Ten Eyck's release, to recover any more than a moiety of the consideration money paid for the lot from which Margaret Chim was evicted? 2d. Whether the interest of that consideration, and the increased value of the premises from the date of the deed to Margaret Chim ought to be added? 3d. Whether the plaintiff was entitled to any retribution for the costs and damages he had sustained by the eviction and recoveries before mentioned?

KENT, C. J. This case resolves itself into these two points for inquiry: 1st. Whether, upon the covenants, the plaintiff be entitled to recover the value of the moiety of one lot at the time of eviction, or only at the time of the purchase, and to be ascertained by the consideration given? 2d. If the latter be the rule of damages, then, whether the plaintiff be also entitled to recover interest upon the purchase-money, and the costs of the eviction?

1. There are two covenants contained in the deed; the one, that the testator was seized in fee, and had good right to convey; the other, that the grantee should hold the land free from any lawful disturbance or eviction. The present case does not state distinctly whether the eviction was founded upon an absolute title to a moiety of one lot, or upon some temporary encumbrance. But I conclude from the manner of stating the questions, and so I shall assume the fact to be, that the testator was not seised of the moiety so recovered when he made the conveyance, and had no right to convey it. The last covenant cannot, then, in this case, have any greater operation than the first, and I shall consider the question as if it depended upon the first covenant merely.

At common law, upon a writ of *warrantia chartæ*, the demandant recovered in compensation only the value for the land at the time of the warranty made, and although the land had become of increased value afterwards, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as

the land was when the warranty was made. Bro. Abr. tit. Voucher, pl. 69; Ibid. tit. Recouver in Value, pl. 59; 22 Vin. 144-146; Tb. pl. 1, 2, 9; Ub. pl. 1, 2, 3; 1 Reeves' Eng. Law, 448. This recompense in value, or *excambium*, as it was anciently termed, consisted of lands of the warrantor, or which his heir inherited from him, of equal value with the land from which the feoffee was evicted. Glanville, l. 3, c. 4; Bracton, 384, a. b. That this was the ancient and uniform rule of the English law, is a point, as I apprehend, not to be questioned; yet, in the early ages of the feudal law on the continent, as it appears (Feudorum, lib. 2, tit. 25), the lord was bound to recompense his vassal on eviction, with other lands equal to the value of the feud at the time of eviction; *feudum restituat ejusdem æstimationis quod erat tempore rei judicatæ.* But there is no evidence that this rule ever prevailed in England; nor do I find, in any case, that the law has been altered since the introduction of personal covenants, to the disuse of the ancient warranty. These covenants have been deemed preferable, because they secure a more easy, certain, and effectual recovery. But the change in the remedy did not affect the established measure of compensation, nor are we at liberty now to substitute a new rule of damages from mere speculative reasoning, and that too of doubtful solidity. In warranties upon the sale of chattels the law is the same as upon the sale of lands, and the buyer recovers back only the original price. 1 H. Black. 17. This is also the rule in Scotland, as to chattels. 1 Ersk. 206. Our law preserves in all its branches symmetry and harmony upon this subject. In the modern case of Flureau v. Thornhill, 2 Black. Rep. 1078, the court of K. B. laid down this doctrine, that upon a contract for a purchase of land, if the title prove bad, and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to damages for the fancied goodness of his bargain. The return of the deposit money, with interest and costs, was all that was to be expected.

Upon the sale of lands the purchaser usually examines the title for himself, and in case of good faith between the parties (and of such cases only I now speak), the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burden-

some would the rule seem to be if that rise was owing to the taste, fortune, or luxury of the purchaser. No man could venture to sell an acre of ground to a wealthy purchaser, without the hazard of absolute ruin. The hardship of this doctrine has been ably exposed by Lord Kaimes in his examination of a decision in the Scotch law, that the vendor was bound to pay according to the increased value of the land. 1 Kaimes' Eq. 284-303; 1 Ersk. 206.

If the question was now *res integra*, and we were in search of a fit rule for the occasion, I know of none less exceptionable than the one already established. By the civil law the seller was bound to restore the value of the subject at the time of eviction, but if the thing had been from any cause sunk below its original price, the seller was entitled to avail himself of this and pay no more than the thing was then worth; for the Roman law, with its usual and admirable equity, made the rule equal and impartial in its operation. It did not force the seller to bear the risk of the rise of the commodity without also taking his chance of its fall. Dig. lib. 21, tit. 2, l. 78; Ibid. l. 66, § 3; Ibid. l. 64, § 1. So far the rule in that law appeared at least clear and consistent; but with respect to beneficial improvements made by the purchaser, the decisions in the Code and Pandects are jarring and inconsistent with each other, and betray evident perplexity on this difficult question. Dig. lib. 19, tit. 1, 45, § 1; Cod. lib. 8, tit. 45, l. q., and Perezius thereon. The more just opinion seems to be, that the claimant himself, and not the seller, ought to pay for them, for *nemo debet locupletari aliena jactura*, and this rule has, according to Lord Hardwicke, been several times adopted and applied by the English Court of Chancery. East In. Com. v. Vincent, 2 Atk. 38. While on this question, I hope it may not be deemed altogether impertinent to observe, that in the late digest of the Hindu law, compiled under the auspices of Sir William Jones, the question before us is stated and solved with a precision at least equal to that in the Roman code, and it is in exact conformity with the English law. On a sale declared void by the judge for want of ownership, the seller is to pay the price to the buyer, and what price? asks the Hindu commentator. Is it the price actually received, or the present value of the thing? The answer is, the price for which it was sold; the price agreed on at the time of the sale, and received by the seller; and this price shall

be recovered, although the value may have been diminished. 1 Colebrook's Digest, 478, 479. Before I conclude this head, I ought to observe, that in the present case it does not appear that any beneficial improvements have been made upon the premises since the purchase by the plaintiff, and although some of my observations have been more general than the precise facts in the case required, yet the opinion of the court is not intended to be given, or to reach beyond the case before us.

2. The next point arising in this case is, whether the plaintiff is entitled to recover interest upon the purchase-money, and the costs of eviction? It is evident, that originally the vendee recovered only what was deemed equivalent to the purchase-money without interest; for he recovered other lands equal only in value to the lands sold at the time of the sale. The rule would have been the same at this day, had not the action for mesne profits been introduced, which takes away from the purchaser the intermediate profits of the land. As long as he was permitted to reap the rents and profits, they formed a just compensation for the use of this money. Whether the action for mesne profits has not been carried too far in our law, by extending it to all cases, instead of confining it to a *mala fide* possession, it is now too late to inquire. I should have strong doubts at least, upon the present rule, if the question was new, but considering it as the established rule, that the action for mesne profits lies generally, I am of opinion that the seller is as generally bound to answer for the interest of the purchase-money, and that the interest ought to be commensurate in point of time, with the legal claim to the mesne profits. This right to interest rests on very plain principles. The vendor has the use of the purchase-money, and the vendee loses the equivalent by the loss of the mesne profits. The interest ought to commence from the time of the loss of the mesne profits. That time is not specifically stated in the present case, and the presumption is, that they were recovered from the date of the plaintiff's purchase, and from that time, I think, the interest ought to be calculated on the consideration sum.

As to the costs of suit attending the eviction stated in the case, it is very clear that the defendants are responsible under the covenant, for the testator was bound to defend and protect the plaintiff and his assigns in the title he had conveyed. At common law, he might have been vouched to come in, and been

substituted as a real defendant in the suit. But the defendants are not answerable for the costs of the suit for mesne profits, as there the testator was not bound to defend.

My opinion accordingly is, that the plaintiff in the present case is entitled to recover the consideration paid for the moiety of the lot evicted, together with interest thereon from the date of the purchase, and the costs of suit in ejectment for the recovery of the same.

LIVINGSTON, J. To find a proper rule of damage in a case like this is a work of some difficulty; no one will be entirely free from objection, or not at times work injustice. To refund the consideration, even with interest, may be a very inadequate compensation, when the property is greatly enhanced in value, and when the same money might have been laid out to equal advantage elsewhere. Yet to make this increased value the criterion where there has been no fraud, may also be attended with injustice, if not ruin. A piece of land is bought solely for the purposes of agriculture; by some unforeseen turn of fortune, it becomes the site of a populous city, after which an eviction takes place. Every one must perceive the injustice of calling on a *bona fide* vendor to refund its present value, and that few fortunes could bear the demand. Who, for the sake of one hundred pounds, would assume the hazard of repaying as many thousands, to which value the property might rise, by causes not foreseen by either party, and which increase in worth would confer no right on the grantor to demand a further sum of the grantee. The safest general rule in all actions on contract, is to limit the recovery as much as possible to an indemnity for the actual injury sustained, without regard to the profits which the plaintiff has failed to make, unless it shall clearly appear, from the agreement, that the acquisition of certain profits depended on the defendant's punctual performance, and that he had assumed to make good such a loss also. To prevent an immoderate assessment of damages, when no fraud had been practiced, Justinian directed that the thing which was the object of contract should never be valued at more than double its cost. This rule a writer on civil law applies to a case like the one before us; that is, to the purchase of land which had become of four times its original value when an eviction took place; but, according to this rule, the party could not recover more than twice the sum he had paid. This law is considered by Pothier as arbitrary, so far as

it confines the reduction of the damages to precisely double the value of the thing, and is not binding in France; but its principle, which does not allow an innocent party to be rendered liable beyond the sum, on which he may reasonably have calculated, being founded in natural law and equity, ought in his opinion to be followed, and care taken that damages in the cases be not excessive. Rather than adhere to the rule of Justinian, or leave the matter to the opinion of a jury, as to which may, or may not be excessive, some more certain standard should be fixed on. However inadequate a return of the purchase-money must be in many cases, it is the safest measure that can be followed as a general rule. This is all that one party has received, and all the actual injury occasioned by the other. I speak now of a case, and such is the present, where the grantee has not improved the property by buildings or otherwise, but where the land has risen in value from extensive causes. What may be a proper course, when dwelling-houses or other buildings, and improvements have been erected, we are not now determining. Why should a purchaser of land recover more than he has paid, any more than the vendee of a house or a ship? If these articles rise in value, the vendors would hardly, if there be no fraud, be liable to damages beyond the prices they had received with interest and costs, unless the plaintiffs could show some further actual injury which they had sustained in consequence of the bargain. The English books afford but little light on this point, although it is understood to be the rule in Great Britain to give only the consideration of the deed. The only thing to be found any ways relating to the subject, is in the Year Books in Hilary Term, 6 Edw. II., part 1, 187. It is there said, that in a writ of dower after the lands had been improved by the feoffee, they shall be extended or set off to the widow, according to the value at the time of alienation; and the reason assigned by Hargrave in his notes on Coke on Littleton, which is not, however, found in the Year Books, is, "that, the heir not being bound to warrant, except according to the value of the land at the time of the feoffment, it is unreasonable the widow should recover more of the feoffee than he could, in case of eviction, of the feoffor." In Connecticut, on the contrary, damages are ascertained by the value at the time of eviction, because of land's increasing worth, which is the very reason, perhaps, it should be otherwise. And although the English practice be adverted to by the court in

giving its opinion, it is supposed to be founded on the permanent value of their lands; but when we recollect that this has been the rule in Great Britain, at least from the commencement of the fourteenth century, since which time lands have greatly advanced in price, we must attribute its origin to some other cause; probably to its intrinsic justice and merit. Even in Connecticut, the rule applies only to actions on covenant of warranty, and probably not to those on covenant of seisin, because, in the latter case, it is supposed the party may immediately acquaint himself with the strength of his title, and bring his action as soon as he discovers it is defective. This reason is not very satisfactory, for with all his diligence a long time may elapse before his title is called in question, or doubts or suspicions raised about its validity.

Without saying, then, what ought to be the rule, where the estate has been improved after purchase, my opinion is, that where there has been no fraud, and none is alleged here, the party evicted can recover only the sum paid, with interest from the time of payment, where, as is also the case here, the purchaser derived no benefit from the property owing to a defective title. The plaintiff must also be reimbursed the costs sustained by the action of ejectment. It was his duty to defend the property, and the costs to which he has been exposed being an actual, not an imaginary loss, arising from the defendant's want of title, he ought to be made whole. In costs are included reasonable fees of counsel, as well as those which are taxable. If a grantee be desirous of receiving the value of land at the time of eviction, he may by apt covenants in the deed, if a grantor will consent, secure such benefit to himself.

The other judges concurred.

Judgment for the plaintiff.

"If a person enters into a contract for the sale of a real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred." He gets nothing for the loss of the bargain. He can recover the sum paid down by him with interest. Bain v. Fothergill, Hof L. 1874, L. R. 7 H. L. 158; Gray v. Howell, 205 Pa. 211; Old Colony R. R. v. Evans, 6 Gray 25; Williams v. Thrall, 101 Wis. 337.

For injury to realty by condemnation under eminent domain and apportionment of damages, see Matter of City of New York, 193 N. Y. 117.

In Wragg v. Mead, 120 Iowa 319, defendant had conveyed land by a

deed containing a covenant against incumbrances. In fact there was an outstanding lease of the premises conveyed. Held, that the measure of damages is the rental value of the land for the unexpired term.

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2. *Contracts Relating to Personal Property*

WHITE *v.* SOLOMON.

Massachusetts, 1895. 164 Mass. 516.

HOLMES, J.

This is an action upon the following contract: Messrs. J. T. White & Co., Publishers, New York— Gentlemen: Please deliver, according to shipment directions given below, one White's Physiological Manikin, Medical Edition, price $35.00. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of $35.00, as follows: $10.00 upon delivery at the express office, and the balance in monthly payments of $5.00, each payable on the first of each and every month thereafter, until the whole amount is paid, for which the publishers are authorized to draw when due.

"It is expressly hereby agreed that, in case of the failure to pay any one of the said installments after maturity thereof, all of said installments remaining unpaid shall immediately become due and payable, and the said James T. White & Co., may take, or cause to be taken, the said manikin from the possession of the said subscriber or their representatives, to whom he may have delivered the same, without recourse against said James T. White & Co. for any money paid on account thereof; it being expressly agreed that the money paid on account shall be for the use and wear of said manikin. * * *

"James M. Solomon, 75 Court Street. * * *

"Boston, Mass."

There was evidence that the manikin was delivered, as agreed, to the express company, freight prepaid; that the defendant refused to receive it; that, in consequence, the express company, after a time, left the manikin at the plaintiffs' place of business, in pursuance of a rule of the company, and without the plaintiffs' assent; and that it is held subject to the defendant's order. There had been no repudiation of the contract by the defendant before the delivery of the manikin. * * *

In an ordinary contract of sale, the payment and the transfer of the goods are to be concurrent acts; and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and, although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly *solvendum in futuro),* of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words "in consideration of delivery" are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. * * * When, as here, by the terms of the contract, every condition has been complied with which entitles the vendors to the whole sum, and, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot, by an act of his own repudiating the title, gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised. See Smith v. Bergengren, 153 Mass. 236, 238.

If the first payment of $10 upon delivery were to be made upon delivery to the buyer, it well may be that, if the buyer refused to accept the manikin or to pay the $10, the sellers' only remedy would be for a breach, and that they could not leave the manikin at his house, and waive the payment against his will, with the result of making the whole sum due. But here the delivery is to be to an express company, and the provision for payment of $10 "upon delivery at the express office" must mean after the delivery; so that the delivery is the first act, and by itself, without more, fixes the rights of the vendors to the price, just as the transfer of the stock did in Thompson v. Alger, 12 Metc. (Mass.) 428, 444. * * * *Exceptions overruled.*

Field, C. J., and Justices Allen and Morton dissent.

1) BAILMENT.

KEITH *v.* DE BUSSIGNEY.

Massachusetts, 1901. 179 Mass. 255.

Action to recover an amount paid on a judgment rendered against plaintiff for board of defendants' horse, received by plaintiff under an agreement providing that the horse should be suitable for ordinary family use, or a reasonable amount for such board. From a judgment in favor of plaintiff, defendants bring exceptions.

KNOWLTON, J. The evidence introduced and offered had no tendency to prove a conversion of the horse by the plaintiff. It went no further than to show that the horse had been used in plowing greensward and in drawing heavy loads to Boston, and that it was not in good condition when the plaintiff endeavored to return it. Even if a jury might have found from the evidence that the plaintiff had not properly used and fed the horse, they could not have found that she had exercised dominion over it adverse to the defendants' rights, in such a way as to make her liable for a conversion of it. At most, it would only have warranted a finding of negligence or breach of contract on the part of the plaintiff, for which she was liable in damages. The horse remained the property of the defendants, and it was their duty to receive it when the plaintiff brought it back. On the issue of liability the evidence was rightly excluded, and the first two of the defendants' requests for instructions were rightly refused.

The third request was as follows: "The plaintiff, after the defendants refused to receive the horse, even if there was no fault on her part, and she had performed all the obligations imposed on her by law or by the contract, should do with it as persons of ordinary experience and prudence would have done with it, having reference to its value and all other circumstances. If the horse was of little value, the fact that the defendants refused to receive it would not justify the plaintiff in keeping and boarding it for a long time, or at a relatively great expense, either in her own stable or elsewhere. She should, after a reasonable time, have taken further steps to determine what disposition should be made of the horse, or have taken means to dispose of it, as she could have done under the statutes of this commonwealth." The judge refused to give this instruction, and ruled that the only

question for the jury to determine was what was a reasonable sum for the keeping of the horse after the time when the plaintiff offered to return it and the defendants refused to take it back. We are of opinion that this ruling was wrong. This was the situation of the parties: The plaintiff had received the defendants' horse under a bailment for hire, by the terms of which she was to have the use of it for its board and keeping. The time at which this bailment was to terminate had arrived, and the plaintiff had taken the horse back to the defendants, and they had refused to receive it. There was no contract at any time by which she was to board the horse at the defendants' expense. They denied that they had any interest in the horse, contended that she had converted it to her own use, and virtually forbade her to do or expend anything on their account for the care or preservation of it. There are at least two possible opinions as to the legal relations of the parties and the principles of law by which their rights are to be determined. One is that suggested by the cases of Whiting v. Sullivan, 7 Mass. 107, Earle v. Coburn, 130 Mass. 596, and Putnam v. Glidden, 159 Mass. 47. In this view the rules of law applicable to the case may be stated as follows: It is settled that, under circumstances like those in this case, the law will not imply a contract to reimburse one for the care of property against an owner who has expressly or impliedly declined to permit such care to be given on his account. No different principle is applied when the property is a live animal from that applicable to ordinary goods. In each of the three cases cited the owner of a horse which was in possession of another person refused to receive it, and the court held that he was not liable for its keeping to the person in whose possession it was left. The rule is that one cannot be held liable on an implied contract to pay for that which he declines to permit to be done on his account. The exception to the rule is that, when the law imposes upon one an obligation to do something which he declines to do, and which must be done to meet some legal requirement, the law treats performance by another as performance for him, and implies a contract on his part to pay for it. A familiar illustration of this is seen when the law holds one liable for necessaries furnished to his wife, if he has without cause refused to provide for her. But there is no such obligation upon one to retain and preserve his property, whether it be live animals or anything else. He may destroy or abandon it, provided he does not thereby imperil the person or

property of another. In the present case the plaintiff had no right, against the will of the defendants, to expend money for the care and preservation of their horse on their account. The only liability of the defendants to her was a liability in damages for their refusal to receive their horse when she returned it. By the terms of the original bailment they impliedly agreed to receive it, and relieve the plaintiff of it, when she should bring it back, after the time for her keeping it had expired. Their refusal to receive it was a breach of their contract, and for such damage as resulted directly from their refusal the plaintiff can recover. But that damage includes only the loss or expense that has fallen, or necessarily would fall, upon the plaintiff in ridding herself of the horse in a reasonable way. It would not include compensation for the board of the horse for an indefinite time for the purpose of preserving it for the defendants. She was under no contract or obligation to keep the horse for their benefit, and, if she so kept it, or if she kept it for her own benefit because she was doubtful how the dispute ultimately would be decided, such keeping was not a direct result of the defendants' breach of contract, and she cannot charge them with the expense of it. The plaintiff in this case had not the full right of an involuntary depositary who finds property whose owner is unknown. The finder of property may do that which is reasonably necessary for its preservation to prevent loss, and hold the owner responsible on the ground of implied agency. Preston v. Neale, 12 Gray, 222. See Field v. Roosa, 159 Mass. 128. But, if the owner is known, and forbids incurring expense at his charge, no contract can be implied against him. In the other view of the case the law may be stated thus: On the refusal of the defendants to receive the horse, the relation of bailor and bailee still continued (Andrews v. Keith, 168 Mass. 558), but the obligation of the plaintiff to set the use of the horse against its keeping was at an end. It was a necessary incident of the relation of the parties that she should be entitled to charge the defendants for the expense which formerly she had been bound to bear, because that expense had to be incurred by her so long as she remained the defendants' bailee. But the defendants' liability under this view is no greater than as stated under the other, for she was bound to do that which was reasonable under the circumstances, to keep the liability as small as possible. There is a line of decisions which establish the doctrine that, where one party has broken an

executory contract, the other, who is in the right, cannot go on indefinitely as if the contract still were unbroken, but is bound to do what he reasonably can to stop the damages for which the first party will be liable in consequence of his breach. Collins v. Delaporte, 115 Mass. 159, 162; Clark v. Marsiglia, 1 Denio, 317; Danforth v. Walker, 37 Vt. 239; Allen v. Jarvis, 20 Conn. 38; Cort v. Railway Co., 17 Q. B. 127. In either view the plaintiff was bound to make such disposition of the horse as would terminate the defendants' liability for damages or for expenses as soon as she could seasonably do it. Exceptions sustained.

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(1) *Damages Against a Common Carrier for Breach of Contract to Transport Personalty.*

HORNE *v.* MIDLAND RAILWAY.

Common Pleas, 1872. L. R. 7 C. P. 583.

WILLES, J. This case raises a very nice question upon the measure of damages to which a common carrier is liable for a breach of his contract to carry goods. It would seem that the damages which he is to pay for a late delivery should be the amount of the loss which in the ordinary course of things would result from his neglect. The ordinary consequence of the non-delivery of the goods here on the 3rd of February would be that the consignee might reject them, and so they would be thrown upon the market generally, instead of going to the particular purchaser; and the measure of damages would ordinarily be in respect of the trouble to which the consignor would be put in disposing of them to another customer, and the difference between the value of the goods on the 3rd and the amount realized by a reasonable sale. That *prima facie* would be the sum to be paid, in the absence of some notice to the carrier which would render him liable for something more special. These consequences would refer to the value of the goods at the time of their delivery to the carrier, the goods being consigned to an ordinary market, and being goods in daily use and not subject to much fluctuation in price. In the present case, taking 2s. 9d. per pair as the value of the shoes, the ordinary damages would be the trouble the plaintiffs were put to in procuring some one to take them at that price, plus the difference, if any, in the market value between the 3rd and the 4th of February. I find nothing in the case to show that there was any diminution

in the value between those days. The plaintiffs' claim, therefore, in that respect would be covered by the 20 l. paid into Court.

But they claim to be entitled to 267 l. 3s. 9d. over and above that sum, on the ground that these shoes had been sold by them at 4s. a pair to a consignee who required them for a contract with a French house for supply to the French army, which price he would have been bound to pay if the shoes had been delivered on the 3rd of February. The special price which the consignee had agreed to pay was the consequence of the extraordinary demand arising from the wants of the French army; and the refusal of the consignee to accept the goods on the 4th was caused by the cessation of the demand for shoes of that character by reason of the war having come to an end. The market-price, therefore, we must assume to have been 2s. 9d. a pair when the shoes were delivered to the carriers; and the circumstance which caused the difference was that the plaintiffs had had the advantage of a contract at 4s. a pair before the extraordinary demand had ceased. Was that, then, an exceptional contract? It was not, I take it, at the time the contract was entered into; but it was at the time the shoes were delivered to the carriers. The plaintiffs sustained a loss of 1s. 3d. a pair on the 4595 pairs of shoes which they failed to deliver in pursuance of their contract. It was, so to speak, a penalty thrown upon them by reason of the breach of contract. In that point of view, the contract was an exceptional one at the time the shoes were delivered to the carriers; and they ought to have been informed of the fact that by reason of special circumstances the sellers would, if the delivery had taken place in time, have been entitled to receive from the consignee a larger price for the shoes than they would have been entitled to in the ordinary course of trade. It must be remembered that we are dealing with the case of a common carrier, who is bound to accept the goods. It would be hard indeed if the law were to fix him with the further liability which is here sought to be imposed upon him, because he has received a notice which does not disclose the special and exceptional consequences which will or may result from a delayed delivery. I think the law in this respect has gone quite as far as good sense warrants. The cases as to the measure of damages for a tort do not apply to a case of contract. That was suggested in a case in Bulstrode (Everard v. Hopkins, 2 Bul. 332), but the notion was corrected in Hadley v. Baxendale. The damages

are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract. I go further. I adhere to what I said in British Columbia Saw-Mill Co. v. Nettleship, Law Rep. 3 C. P. 499, at p. 509, viz. that "the knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." Was there any notice here that the defendants would be held accountable for the particular damages now claimed? In the ordinary course of things, the value of the shoes was 2s. 9d. a pair at the time they were delivered to the defendants to be carried. There was no change in their market value between the 3rd of February and the 4th; and no notice to the carriers that the consignees had contracted to pay for them the exceptional price of 4s. a pair. The defendants had no notice of the penalty, so to speak, which a delay in the delivery would impose upon the plaintiffs. It would, as it seems to me, be an extraordinary result to arrive at, to hold that a mere notice to the carriers that the shoes would be thrown upon the hands of the consignors if they did not reach the consignees by the 3rd of February, should fix them with so large a claim, by reason of facts which were existing in the minds of the consignors, but were not communicated to the carriers at the time.

For these reasons I come to the conclusion that enough has been paid into court to cover all the damages which the plaintiffs are entitled to recover, and that there must be judgment for the defendants.

KEATING, J., concurs. *Judgment for the defendants.*

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2) SALES OF PERSONAL PROPERTY.

(1) *Breach of Vendor.*

SHIELDS *v.* PETTIE.

New York, 1850. 4 N. Y. 122.

The action was assumpsit to recover a quantity of pig iron. The contract between the parties was concluded in these words:

"New York, July 19, 1847. Sold for Messrs. George W.

Shields & Co., to Messrs. Pettee & Mann, one hundred and fifty tons Gartsherrie pig iron, No. 1, at $29 per ton, one-half at six months, one-half cash, less four per cent., on board Siddons.

"Thomas Ingham, Broker."

On the arrival of the "Siddons" the defendants received sixty or seventy tons of the iron, but on ascertaining its inferior quality, declined to accept and pay for it, or the residue, as of the quality required by the contract. The plaintiffs offered to deliver the residue, which was declined, and then demanded payment for the portion delivered at the contract price, which was also refused, as was a demand for the return of the iron delivered. The price of No. 1 iron had by this time advanced about $3.50 per ton above the contract price. The defendants had parted with a portion of the iron before its return was demanded.

The jury were instructed that under the circumstances the defendants were liable by an implied contract to pay for the iron received at its then market value. The plaintiffs had judgment on a verdict for $2,197.39. The defendants appealed.

HURLBUT, J. In my judgment the contract was not a sale but an agreement to sell, which was not executed, and which could only be required to be executed upon the arrival of the ship with the iron on board. The arrival of the vessel without the iron would have put an end to the contract, which was conditional as a sale, to arrive. The vessel was at sea at the time, this was known to both parties, and neither could be certain, either of her arrival or of her bringing the iron. If a part only had arrived, the plaintiffs would not have been bound to deliver nor the defendants to accept it. There was no warranty, express or implied, either that any iron should arrive, or that arriving, it should be of a particular quality. One hundred and fifty tons of Gartsherrie pig iron of the quality denominated No. 1 was expected to arrive by the "Siddons," and the contract was to the effect, that if that quantity and quality of iron did so arrive, one party should sell and the other should receive it at a certain price per ton. The iron called for by the contract did not arrive, but iron of a different quality, and I think the contract was at an end. (Boyd v. Siffkin, 2 Camp. N. P. 326; Alewyn v. Pryor, 1 Ryan & Moody, 406; Lovatt v. Hamilton, 5 Mees. & Wels. 639; Johnson v. Macdonald, 9 id. 600; Russell v. Nicoll, 3 Wend. 112.)

The jury were instructed that, under the circumstances of the case, the law implied a contract on the part of the defendants

to pay for the iron which they received at the then value of the same in the market, and they found accordingly; which, in effect compelled the defendants to pay for an inferior article a greater price than that stipulated for in the contract. This arose from the circumstance of a rise in the market, intermediate the contract and the time of delivery. But this ought not to affect the rule of damages which cannot bend to an accident of this nature, but must remain the same in a case like the present, whether the commodity rise or fall, or remain stationary in the market. Where, upon a sale of goods, there is no agreement as to the price, the law implies a contract on the part of the buyer to pay for them at the market value. The present case cannot be excepted from the operation of this rule. There was no error in the charge of the learned judge, provided the law implied a promise on the part of the defendants to pay any thing whatever for the iron which they received. This they had taken in good faith, supposing that it answered the contract, and intending to pay for it accordingly; but finding it to be of an inferior quality, they declined to pay the contract price, and upon a demand for the iron were not in a condition to restore it, as they had parted with a portion of it. They, however, had received the iron rightfully, in the character of vendees, and up to the time of the demand by the plaintiffs, the case exhibits nothing in the nature of a tort, but savors altogether of contract. After the demand and refusal, the case was so far modified as to assume, technically at least, the complexion of a tort, so that trover might have been maintained by the plaintiffs. But although they might have done so, were they bound to bring their action in that form, or were they at liberty to disregard the tort and to treat the defendants as still retaining their original characters of purchasers of the iron and to charge them accordingly? I perceive no reason why they may not be permitted to do so. The goods were neither wrongfully taken, nor do the defendants claim title to them. The case rested originally in contract, and the only difference between the parties related to the price of the article delivered. If the plaintiffs had brought trover, the rule of damages would not have been more favorable to the defendants than the one laid down at the trial, and I am unable to perceive in what respect they can be injured by the present form of action. In general it would be the most favorable to the defendant. In Young v. Marshall (8 Bing. 43), Tindal, Ch. J., declared that no party was bound to sue in tort,

when by converting the action into one of contract he does not prejudice the defendant. It is not necessary to go this length, nor as far as the court went in Hill v. Davis (3 N. H. 384), for the purpose of determining the question before us; nor is the point presented in the last case of much importance, since the distinctions which obtained at common law in the forms of action have been abrogated in this state. I, therefore, abstain from expressing any opinion upon it. It is enough for our present purpose, that, in the case before us, the cause of action arose out of an imperfect sale and delivery of goods, and not out of a wrongful taking of them by the defendants; that the tortious feature in the case is scarcely one of substance, but is rather of a technical character; that in effect the parties must be deemed to have agreed as to every thing except the price of the goods; and that this being so, the plaintiffs were at liberty to disregard whatever might savor of tort, and require the defendants to respond in their substantial characters as purchasers of the iron for what it was worth in the market.

The judgment of the superior court ought to be affirmed.

Judgment affirmed.

MESSMORE *v.* THE NEW YORK SHOT AND LEAD CO.

New York, 1869. 40 N. Y. 422.

The action was brought to recover damages for breach of the following contract, in writing:

"NEW YORK, June 8, 1861.

"MR. DANIEL MESSMORE, No. 23 William Street:

"Dear Sir—We will fill your order for 100,000 lbs. of Minie bullets—58 calibre, U. S. Rifle Musket—and deliver them on board such lines as you may direct, as rapidly as possible, on the following terms:

"The price to be 7c. per lb. If packed in kegs the charge to be 12c. per 100 lbs., and cartage 50c. per ton. The terms of payment to be prompt cash for each lot as delivered, to be paid on presentation of invoice and bill of lading.

"Respectfully yours,

"N. Y. SHOT AND LEAD CO.

"By J. E. Granniss."

At the time the plaintiff gave his order for these bullets he was under contract to furnish the state of Ohio with the same num-

ber and quality of bullets at seven and three-fourths cents per pound and the expenses of transportation at Columbus, Ohio, and the defendants were so informed. Twenty thousand lbs. were sent to the quartermaster-general of Ohio, but were rejected as not conforming to the contract. They were found to be of all calibres and useless. The plaintiff then offered to return the bullets to the defendants, but they refused to receive them. Plaintiff then sold them at Columbus, Ohio, without notice to defendants, for the best price he could obtain, viz., four and a half cents per pound. At the trial is was proved, that bullets of the kind contracted for, were worth at that time, at Columbus, nine cents per pound.

The defendant claimed that the damages, if any, could only be the difference between the contract price and market price at New York.

Judgment for plaintiff was affirmed by the General Term of the New York Common Pleas.

MASON, J. It is not necessary to decide, in this case, whether the plaintiff was entitled, upon the evidence, to recover the value of these bullets upon the market price in Ohio, as shown by the evidence, or whether the court erred in admitting the evidence to show the value of such bullets there, as the verdict of the jury shows that no such rule of damages was adopted by the jury in giving this verdict. They simply allowed to the plaintiff the profits which he would have made had the contract been fulfilled, to wit: Three-fourths of a cent per pound, and the express charges and storage on what was sent. The plaintiff submitted two statements: One made upon the basis that he was entitled to recover just the difference between the purchase price and the price at which he had contracted for their resale to the State of Ohio, with the express charges which he had paid on those sent, which were refused because of their inferior quality; the other was the difference between the seven cents per pound and the nine cents, which the evidence showed them worth in Ohio. These statements were all carried out in items and figures, the first statement making the plaintiff's claim for damages $1,128.50, and the second $1,949.22, and the verdict of the jury was $1,128.50; showing conclusively that they adopted the first statement without computation, and gave the plaintiff, as damages, no more than the profits he would have made had the contract been fulfilled, and what he paid out for express charges on those

sent which were refused. The defendants claim and insist, however, that this collateral contract of the plaintiff with the State of Ohio was improperly allowed in evidence and could not be allowed as the basis of damages between these parties; that in short the plaintiff can only recover the difference between the contract price and the market value in the city of New York where the contract of sale was made, and where the property was to be delivered under the contract.

The general rule of damages, ordinarily, is the difference between the contract price and the market value of the article at the time and place of delivery fixed by the contract. This is not the invariable rule in all cases. The general rule is, that the party injured by a breach of a contract, is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. In commodities commonly purchasable in the market, it is safe to say that the purchaser is made whole, when he is allowed to recover the difference between the contract price and the value of the article in the market at the time and place of delivery; because he can supply himself with this article by going into the market and making his purchase at such price, and these are all the damages he is ordinarily entitled to recover, for nothing beyond this is within the contemplation of the parties when they entered into the contract.

This rule, however, is changed when the vendor knows that the purchaser has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the article to enable him to fulfill the same, because those profits which would accrue to the purchaser upon fulfilling the contract of re-sale, may justly be said to have entered into the contemplation of the parties in making the contract. (Griffin v. Colver, 16 N. Y. R. 493.) This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of a contract, he shall, so far as money can do it, be placed in the same situation with respect to damages, as if the contract had been performed.

It was clearly competent for the plaintiff to show that the defendants were informed of the object of the plaintiff in making this contract of purchase of them, and that it was to fulfill an

existing contract of his own with the State of Ohio at a price of three-fourths of one cent per pound, above the price he was to pay them, and that they were to manufacture these bullets to enable him to fulfill such contract, because it showed that these profits to this plaintiff were in the contemplation of the parties in entering into this contract, and as the evidence showed such to be the fact, these profits that would have accrued to the plaintiff had the contract been performed by the defendants are in no sense speculative or uncertain profits. The result of a non-performance is a practical and certain loss to the plaintiff to that extent, unless the plaintiff could have supplied himself by going into the market, and making a purchase to fulfill his contract, which, at that particular time, it is pretty evident, he could not do, as lead went up, after the making of this contract, rapidly, and bullets were sold in Ohio for nine cents in a month after the making of this contract; and the plaintiff testified that he was offered nine cents for a good Minie bullet by two or three different persons, and that Woods offered him that for 100,000 lbs., if delivered within ten days. This was in July and August, only a month or two after this contract was entered into, and the demand became so great that lead went up five to six cents a pound. The evidence fails to show that these bullets were sacrificed in the sale of them by the plaintiff; on the contrary, the evidence is they were sold for all they were worth. (See case, fols. 82 and 46.) This case does not fall within the principle of Reed v. Randall, 29 N. Y. R. 358, as the plaintiff never had an opportunity to examine the bullets and no inspection was ever made of them by the plaintiff, or any one in his behalf. They were put up in bags and kegs by the defendants and actually shipped by them in their own name, and the contract itself required them to deliver them to such lines of transportation as the plaintiff should direct, and evidently the plaintiff had no opportunity to examine them and therefore cannot be held to have made such an acceptance as to deprive him of his action.

The plaintiff had the right to sell these bullets at the best price he could obtain for them, after his offer to return them, and the defendants' refusal to receive them; and the law did not require him to give notice to the defendants of the time and place of sale. (Pollen & Colgate v. LeRoy & Smith, 30 N. Y. R. 549.) This is not very material, however, as the evidence is they were sold for all they were worth.

There was no error committed in allowing the plaintiff to recover what he paid out for transportation, on these bullets. By his contract with the State of Ohio, the State was to pay these expenses of transportation, and as they refused to receive them because of their defects, the plaintiff has sustained this loss, and the defendants cannot complain of this, when they accepted his order and actually shipped them by express themselves.

The judgment should be affirmed. *All concur.*

CORY *v.* THAMES IRONWORKS & SHIPBUILDING COMPANY, LIMITED.

Queen's Bench, 1868. L. R. 3 Q. B. 181.

This was an issue directed by the Court of Chancery under 8 & 9 Vict. c. 109, to ascertain the amount of damages to which the plaintiffs were entitled, *inter alia*, by reason of the delay by the defendants in the delivery of the hull of a floating-boom derrick, under a contract of sale.

At the trial before Shee, J., at the sittings in London, after Hilary Term, 1864, a verdict was taken for the plaintiffs, subject to a case to be stated by an arbitrator.

The plaintiffs are coal merchants and shipowners, having a very large import trade in coal from Newcastle and other places into the port of London. The defendants are iron manufacturers and shipbuilders in London.

The plaintiffs had introduced, at the docks where they discharged the cargoes of coal from their ships, a new and expeditious mode of unloading the coals by means of iron buckets, which were worked by hydraulic pressure over powerful cranes, and the plaintiffs' trade having considerably increased, they were desirous of improving the accommodation offered in the discharge of their vessels by the above mode; this the defendants were not aware of.

The defendants agreed to sell the plaintiffs for 3500 l. a floating-boom derrick, and to deliver it before the 1st of January, 1862. The plaintiffs purchased the derrick for the purposes of their business, in order to erect and place in it, as they in fact did, large hydraulic cranes and machinery, such as they had previously used at the docks, and by means of these cranes to transship their coals from colliers into barges without the necessity for any intermediate landing, the derrick, for this purpose,

being moored in the river Thames, and the plaintiffs paying the conservators of the river a large rent for allowing it to remain there.

The derrick was the first vessel of the kind that had ever been built in this country, and the purpose to which the plaintiffs sought to apply it was entirely novel and exceptional. No hull or other vessel had ever been fitted either by coal merchants or others in a similar way or for a similar purpose; and the defendants at the date of the agreement had notice that the plaintiffs purchased the derrick for the purpose of their business, considering that it was intended to be used as a coal store; but they had no notice or knowledge of the special object for which it was puchased, and to which it was actually applied.

At the date of the agreement the defendants believed that the plaintiffs were purchasing the derrick for the purpose of using her in the way of their business as a coal store; but the plaintiffs had not at that time any intention of applying the derrick to any other purpose than the special purpose to which she was in fact afterwards applied.

If the plaintiffs had been prevented from applying the derrick to the special purpose for which she was purchased, and to which she was applied, they would have endeavored to sell her to persons in the hulk trade as a hulk for storing coals, and had they been unable to sell her, they could and would have employed her in that trade and in that way themselves; that was the most obvious use to which such a vessel was capable of being applied by persons in the plaintiffs' business; but the hulk trade is a distinct branch of the coal trade, and neither formed nor forms any part of the business carried on by the plaintiffs; and the derrick being an entirely novel and exceptional vessel and the first of the kind built, no vessel of the sort had ever been applied to such a purpose. The derrick was, however, capable of being applied to and profitably employed for that purpose, and had she been purchased for that purpose her non-delivery at the time fixed by the agreement would have occasioned loss and damage to the plaintiffs to the amount of 420 l.

The defendants did not deliver the derrick to the plaintiffs until the 1st of July, 1862. If the defendants had delivered the hull to the plaintiffs in proper time, the plaintiffs would have realized large profits by the use of it in the aforesaid manner, and they were put to great inconvenience and sustained great

loss owing to their not having possession of the hull to meet the great increase in their trade.

The plaintiffs also lost 8 l. 15s. for interest upon the portion of the purchase-money of the hull paid by them to the defendants before delivery.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover against the defendants the whole or any, and which of the above heads of damage.

The Court then called upon

J. D. Coleridge, Q. C. (Garth, Q. C., and Philbrick with him) for the defendants. No doubt the plaintiffs are entitled to the interest; but they are not entitled to the 420 l. This sum is the damages resulting from a special purpose, within the principle of Hadley v. Baxendale. The rule laid down in Hadley v. Baxendale is that the plaintiff can only recover such damages as are the natural result of the breach of contract in ordinary circumstances, or,—which would appear to be another mode of expressing the same thing,—what were in the contemplation of both parties at the time of the contract.

[BLACKBURN, J. The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of.]

[COCKBURN, C. J. No doubt, in order to recover damage arising from a special purpose the buyer must have communicated the special purpose to the seller; but there is one thing which must always be in the knowledge of both parties, which is, that the thing is bought for the purpose of being in some way or other profitably applied.]

But it [the use to which the defendants supposed the hull was intended to be applied] is a use totally distinct from that to which the plaintiffs applied and intended to apply it.

[COCKBURN, C. J. The two parties certainly had not in their common contemplation the application of this vessel to any one specific purpose. The plaintiffs intended to apply it in their trade, but to the special purpose of transhipping coals; the defendants believed that the plaintiffs would apply it to the purpose of their trade, but as a coal store. I cannot, however, assent to the proposition that, because the seller does not know the purpose to which the buyer intends to apply the thing bought, but believes that the buyer is going to apply it to some other and different purpose, if the buyer sustains damage from the non-

delivery of the thing, he is to be shut out from recovering any damages in respect of the loss he may have sustained. I take the true proposition to be this. If the special purpose from which the larger profit may be obtained is known to the seller, he may be made responsible to the full extent. But if the two parties are not *ad idem quoad* the use to which the article is to be applied, then you can only take as the measure of damages the profit which would result from the ordinary use of the article for the purpose for which the seller supposed it was bought. And the arbitrator, as I understand it, finds that the hull was capable of being applied profitably as a coal store, if it had not been applied by the plaintiffs to their special purpose.]

But no vessel of the sort had ever been applied to such a purpose as a coal store. And this kind of damage is a damage which the plaintiffs never suffered, and which they never contemplated suffering.

[MELLOR, J. It was the most obvious purpose to which such a vessel could be applied in the plaintiffs' trade.

COCKBURN, C. J. And the purpose to which it may be fairly supposed, and as in fact the defendants did suppose, that the plaintiffs would have applied it, had they been prevented by the failure of the machinery, or any other cause, from being able to apply it to their special purpose. And so far as the defendants, the sellers, expected that the plaintiffs, the buyers, would be losers by their non-delivery of the vessel according to contract, so far it is just and right that the defendants should be responsible in damages.]

That, no doubt, would be a just rule; but it is not the rule laid down in Hadley v. Baxendale.

[BLACKBURN, J. That argument seems to assume that the principle laid down in Hadley v. Baxendale is that the damages can only be what both parties contemplated, at the time of making the contract, would be the consequence of the breach of it; but that is not the principle laid down in Hadley v. Baxendale. The court say: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, i. e. according to the usual course of things, from such breach of contract itself,"—that is one alternative,—"or such as

may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Now, in the present case the breach of contract was the non-delivery at the agreed time of a hull capable of being used as a hulk for storing coals, and the consequences that would naturally arise from such non-delivery of it would be that the purchaser would not be able to earn money by its use, and this loss of profit during the delay would be the measure of the damages caused by the non-delivery.]

* * *

COCKBURN, C. J. I think the construction which Mr. Coleridge seeks to put upon the case of Hadley v. Baxendale is not the correct construction as applicable to such a case as this. If that were the correct construction, it would be attended with most mischievous consequences, because this would follow, that whenever the seller was not made aware of the particular and special purpose to which the buyer intended to apply the thing bought, but thought it was for some other purpose, he would be relieved entirely from making any compensation to the buyer, in case the thing was not delivered in time, and so loss was sustained by the buyer; and it would be entirely in the power of the seller to break his contract with impunity. That would necessarily follow, if Mr. Coleridge's interpretation of Hadley v. Baxendale was the true interpretation. My brother Blackburn has pointed out that that is not the true construction of the language which the court used in delivering judgment in that case. As I have said in the course of the argument, the true principle is this, that although the buyer may have sustained a loss from the non-delivery of an article which he intended to apply to a special purpose, and which, if applied to that special purpose, would have been productive of a larger amount of profit, the seller cannot be called upon to make good that loss if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such larger profit might result; and although, in point of fact, the buyer does sustain damage to that extent, it would not be reasonable or just that the seller should be called upon to pay it to that extent; but to the extent to which the seller contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realized if the article had been delivered would be lost to the other party, to that extent he ought to pay. The buyer has

lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed that the article would be applied to the ordinary purposes to which it was capable of being applied. I think, therefore, that ought to be the measure of damages, and I do not see that there is anything in Hadley v. Baxendale which at all conflicts with this.

BLACKBURN, J. I am entirely of the same opinion. I think it all comes round to this: The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfillment of the contract, not more than that, but what might be reasonably expected to flow from the non-fulfillment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz., that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because if he had known what the consequence would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the non-fulfillment of his contract. On the other hand, if the party has knowledge of circumstances which would make the damages more extensive than they would be in an ordinary case, he would be liable to the special consequences, because he has knowledge of the circumstances which would make the natural consequences greater than in the other case. But Mr. Coleridge's argument would come to this, that the damages could never be anything but what both parties contemplated; and where the buyer intended to apply the thing to a purpose which would make the damages greater, and did not intend to apply it to the purpose which the seller supposed he intended to apply it, the consequence would be to set the defendant free altogether. That would not be just, and I do not think that was at all meant to be expressed in Hadley v. Baxendale. Here the arbitrator has found that what the defendants supposed when they were agreeing to furnish the derrick was that it was to be employed in the most obvious manner to earn money, which the arbitrator assesses at 420 l. during the six months' delay; and as I believe the natural consequence of not delivering the derrick was that that

sum was lost, I think the plaintiffs should recover to that extent.

MELLOR, J. I am entirely of the same opinion. The question is, what is the limit of damages which are to be given against the defendants for the breach of this contract? They will be the damages naturally resulting, and which might reasonably be in contemplation of the parties as likely to flow, from the breach of such contract. It is not because the parties are not precisely *ad idem* as to the use of the article in question that the defendants are not to pay any damages. Both parties contemplated a profitable use of the derrick; and when one finds that the defendants contemplated a particular use of it as the obvious mode in which it might be used, I think as against the plaintiffs they cannot complain that the damages do not extend beyond that which they contemplated as the amount likely to result from their own breach of contract.

Judgment for the plaintiffs accordingly.

BROWN *v.* MULLER.

Exchequer, 1872. L. R. 7 Ex. 319.

An action for non-delivery of iron.

KELLY, C. B. I should not have felt much doubt as to what should be the measure of damages in this case, but for the hesitation expressed during the argument by my brother Martin; a hesitation which, however, I understand now to be removed. The defendant undertook in this case to deliver 500 tons of iron during the months of September, October, and November, 1871, in about equal portions; that is, at the rate of about 166 tons in each month; and he has failed to deliver altogether. Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. This being the general principle of assessment, we find that the defendant delivered no iron in September, and on the 30th of that month, I think, the plaintiff was entitled to receive, as damages, the difference on that day between the contract and market price of 166 tons. No other satisfactory principle can be suggested. The plaintiff might have resold this amount of iron to a sub-purchaser, and to satisfy this sub-contract might have bought at the then market price; or else must have paid the sub-purchaser the difference; and in either case

would be entitled to receive it from the defendant. Then, when the 31st of October arrives, the same state of things recurs as to the second installment of iron to be delivered; and again the damages will be the difference between the contract and market prices on that day. And a similar calculation must be made with reference to the end of November. Therefore the plaintiff will be entitled to recover, altogether, the sum of the three differences at the end of the three months respectively.

It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or at all events when the first breach took place, and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favorable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair right to complain that his loss had not been mitigated as far as possible.

The case of Frost v. Knight, L. R. 7 Ex. 111, has been referred

to as showing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part, and even although he had elected thus to treat the contract, yet in considering the question of damages they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, or November. The damages should therefore be assessed on the principle I have indicated, and the rule made absolute to reduce the damages to 109 l. 4s.

MARTIN, B., and CHANNEL, B., concur.

ASHMORE *v.* COX.

L. R. 1 Q. B. 1899, 436.

LORD RUSSELL, of Killowen, C. J. In this case the plaintiffs are suing the defendants for breach of contract of April 27, 1898. The contract related to an intended shipment of 250 bales of Manila hemp at a stipulated price, to be shipped by sailer or sailers between May 1 and July 31. The plaintiffs say that the defendants failed to comply with the contract. The facts are these: The contract was entered into on April 27, 1898. No shipment was made by the defendants or for them between May 1 and July 31, 1898, and no shipment was made by any other persons which the defendants sought to appropriate to the contract. But on or about September 15 shipment was made by a steamship called the Dulwich from Manila of hemp which would in regard to character and quality have satisfied the contract. Following that shipment, the defendants on October 27 made a declaration of that shipment as a declaration of a shipment within the terms of the contract.

The first question is whether that is a proper declaration in compliance with the terms of the contract. The declaration is addressed by the defendants to the plaintiffs, and is in these terms: "Contract, April 27, 1898, No....., for 250 bales F. Ct. Manila hemp. In fulfilment of the above, we beg to declare the following and request your confirmation in due course. F. C. 250 bales. Per Dulwich (ss.), London. Bill of lading, dated

Manila, 15/9/98 (signed), C. S. Cox & Co." On October 29 the plaintiffs wrote: "Contract dated 27/4/98, 250 bales hemp F. C. May-July sailer. We return herewith your declaration for 250 bales F. C. hemp, per Dulwich, against above contract. We are instructed by our buyers to say they will not accept this hemp, as it is not in accordance with their contract." They do not state the grounds upon which they take up that position, but it is clear that the grounds were that the shipment was not by sailer or sailers, and was not made between May 1 and July 31. So the matter went on, the plaintiffs not in terms treating that declaration as a breach of the contract, but contenting themselves with saying, "We cannot accept this as a proper declaration such as we are entitled to under the terms of our contract." On November 4 the defendants for the first time write saying that they are not in a position to make any other declaration than the declaration of the shipment by the Dulwich. Up to that time it would have been open to the defendants, as I conceive, had the circumstances of the trade permitted of it, to have got hold of any other shipment, if there were any such, of Manila hemp by sailer or sailers shipped between May 1 and July 31, and applied such shipment to the contract in question. In my judgment the defendants are not estopped, if they make a declaration which is properly objected to as not answering the contract, from making a fresh declaration, provided always they can make a fresh declaration within a reasonable time conformably with the contract.

The first question that arises upon this state of facts is, "Was the declaration a bad declaration?" On behalf of the defendants it is said that it was not bad, upon the ground that neither the stipulation as to sailer or sailers (being the character of the vessel to carry the intended shipment), nor that as to the dates between which the shipments were to be made, were conditions precedent in the contract, but were merely collateral stipulations, which, if the breach of them entailed damages upon the buyer, would give him a right of action. I am unable to accept that contention. No doubt there are a number of cases, all turning upon the particular contract, in which the Courts have held that certain stipulations, which did not go to the essentials of the contract, are not conditions precedent. But those cases do not, in my judgment, apply to the dates of shipment in the present contract, and I am inclined to think also that they

do not apply to the provision that shipment is to be made by sailer, or sailers on this short ground—that in the present contract the parties have chosen by the very terms in which the stipulation appears to make those events conditions precedent. They have said that the buyers shall not be called upon to accept a shipment not in sailer or sailers, or not made between May 1 and July 31. I therefore hold that those stipulations are conditions precedent.

On behalf of the defendants it was also contended that they were excused from the fulfilment of the contract on the ground of impossibility of performance of it. This contention was divided into two heads. First, it was said that it was an implied condition of the contract, and therefore not depending upon the express words of the contract, that it should be possible to ship between the named dates by sailer or sailers. In support of that contention one or two cases were cited, the principal being Howell v. Coupland, 1 Q. B. D. 258. In my judgment that case is no authority for the proposition here contended for; it turned on the construction of the contract in that case. The Court there construed the contract as meaning that the buyer took the chance of the contract being defeated in its performance by failure of the potato crop by disease, the seller using all reasonable skill. That has no bearing upon the present case. Here the stipulations are that the defendants shall sell 250 bales of hemp; that the shipment shall be made from the Philippine Islands, that it shall be made by sailer or sailers, that it shall be made between the named dates, and that the declaration shall be made in the manner provided by the contract. The defendants have taken upon themselves the absolute responsibility of being able to make a declaration complying with the contract and appropriating to the contract 250 bales of the commodity shipped by sailer or sailers between May 1 and July 31, 1898. They have taken upon themselves (subject to the concluding clause of the contract) the responsibility that those events shall take place, or that they will pay damages if from any cause they are prevented from carrying out the contract. I therefore hold that there was no such implied condition. I do not know that it is necessary, apart from the question of construction which remains, to refer to the fact that it does appear that there was a shipment which would have been capable of appropriation to this contract, if the sellers could

have got hold of it—a shipment to Liverpool of hemp of the requisite quality and quantity.

Secondly, it is said that, even though there is no such implied condition, there is an express condition in the contract that it shall be possible to ship the goods in conformity with the terms of the contract. The condition is as follows: "Should the goods or any portion thereof not arrive in London from loss or other unavoidable cause, this contract to be void for such portion." Undoubtedly, reading that clause by itself apart from the terms of the contract, I should have hesitated a long time before I arrived at the conclusion that, standing alone, it necessarily applies only to goods in fact shipped. But it cannot be read so as to give effect to the object of the contract between the parties without having regard to the other stipulations contained in the contract. The ship was not, as it were, earmarked. The seller might appropriate to the contract any shipment of proper quality by sailer or sailers between the stipulated dates. It is therefore true to say, as was very forcibly argued on behalf of the plaintiffs, that when you come to consider the concluding words of that clause it is clear that the buyer has nothing to do with any goods not appropriated to the contract by declaration, and it is clear that the defendants, having made a faulty declaration, might declare another shipment made by any ship answering the description in the contract. The condition therefore contemplates goods which have been shipped, and I think also declared. In my judgment the facts in this case do not show that the non-arrival of the goods in London was caused by any unavoidable cause within the meaning of the contract.

As to the question of damages. If when the defendants made the declaration which I have held to be bad under the contract they had said, "This is the only declaration we can make," and the plaintiffs had said, "Very well, you have broken the contract," the measure of damage would be computable by the difference between the contract price and the market price at that date. But the plaintiffs merely said, "We cannot accept this as a declaration." I think that if the defendants could then have obtained a shipment which complied with the terms of the contract they might have amended the declaration, because the plaintiffs had not treated that as an absolute breach and repudiation of the contract. On November 4 the defendants stated that they could not make any other declaration—in effect, that they

repudiated the contract. The plaintiffs thereupon issued their writ. The difference between the contract price and the market price on November 4 is the measure of damages.

Judgment for the plaintiffs.

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a *Breach of Warranty.*

PERLEY *v.* BALCH.

Massachusetts, 1839. 23 Pick. 283.

Assumpsit on a promissory note. At the trial in the court of common pleas, before Williams J., the defendant introduced evidence tending to prove, that the consideration of the note was the sale of an ox by the plaintiff to the defendant, with a warranty, that the ox would fatten as well as any one the defendant then had; that one eye of the ox, which was then apparently defective and diseased, was falsely and fraudulently represented by the plaintiff to have been hooked out, whereas, in fact, it had been destroyed by a cancer; and that this disease was incurable, and rendered the ox incapable of being fattened and entirely worthless for any other purpose.

It did not appear, that the defendant had returned or offered to return the ox to the plaintiff, or had ever notified to the plaintiff, that he was dissatisfied with the contract, until after the commencement of this action, which was several years after the sale. The defendant kept the ox in his pasture, &c. for several months, and was at some trouble to ascertain whether it would answer his purpose. It did not appear what became of the ox afterwards.

The defendant also offered evidence tending to show, that he purchased the ox for the sole purpose of fattening it, and that this was known to the plaintiff at the time of the sale; and he contended, that, upon these facts, there was an implied warranty on the part of the plaintiff, that the ox should be reasonably fit for that purpose.

The judge instructed the jury, that no such implied warranty arose from these facts; that if they were satisfied that the plaintiff warranted, that the ox would fatten as well as any one which the defendant then had, and that the warranty was false, or if they were satisfied, that the plaintiff falsely and fraudulently represented the eye of the ox to have been hooked out, whereby the defendant was induced to purchase it, and if they were further satisfied, that the ox, if it had been re-

turned to the plaintiff in a reasonable time, would have been of no pecuniary value to him, the defendant would be entitled to a verdict; but that, otherwise, their verdict should be for the plaintiff.

The jury returned a verdict for the plaintiff; and the defendant excepted to the instructions to the jury.

MORTON, J., afterward drew up the opinion of the court. The instruction, that there was no implied warranty, is not now complained of, and is undoubtedly correct. See Emerson v. Brigham, 10 Mass. R. 197; Shepherd v. Temple, 3 N. Hamp. R. 455. Every sale of chattels contains an implied warranty, that the property of them is in the vendor. But it is well settled by authority as a general rule, that no warranty of the quality, is implied from the sale. The maxim, *caveat emptor*, governs. 2 Kent's Com. 478; Chitty on Contr. 133; Champion v. Short, 1 Campb. 53; Bragg v. Cole, 6 Moore, 114; Stuart v. Wilkins, 1 Doug. 20; Parkinson v. Lee, 2 East, 314; Mockbee v. Gardner, 2 Har. & Gill, 176.

But the learned justice of the common pleas further instructed the jury that if there was a fraud in the sale, or an express warranty and a breach of it, in either case, the defendant might avoid the contract, by returning the ox within a reasonable time; or, if the ox would have been of no value to the plaintiff, then without returning him. Whether the jury found their verdict upon the ground, that no fraud or express warranty was proved, or that the ox was of no value, does not appear. If therefore any part of the instructions was incorrect, the defendant is entitled to a new trial.

Where the purchaser is induced by the fraudulent misrepresentations of the seller, to make the purchase, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract, and recover back the consideration paid, or, if he has given a note, resist the payment of it. Here was no return of the property purchased, but if that property was of no value, whether there was any fraud or not, the note would be *nudum pactum*. The defendant's counsel, not controverting the general rule, objects to the qualification of it. He says, that the ox, though valueless to the defendant, might be of value to the plaintiff, and so the defendant would be bound by his contract, although he acquired nothing by it. But a damage to the promisee is as good a consideration as a benefit to the

promisor. If a chattel be of no value to any one, it cannot be the basis of a bargain; but if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it be a loss to the seller, he is entitled to remuneration for his loss.

But it is apparent, that a want of consideration was not the principal ground of defense. The defendant mainly relied upon fraud or a warranty. And to render either available to avoid the note, it was indispensable, that the property should be returned. He cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. In such case the return would be a useless ceremony, which the law never requires. The purchaser cannot derive any benefit from the purchase and yet rescind the contract. It must be nullified *in toto*, or not at all. It cannot be enforced in part and rescinded in part. And, if the property would be of any benefit to the seller, he is equally bound to return it. He who would rescind a contract, must put the other party in as good a situation as he was before; otherwise he cannot do it. Chitty on Contr. 276; Hunt v. Silk, 5 East, 449; Conner v. Henderson, 14 Mass. R. 319.

The facts relied upon by the defendant to defeat the note, might, if proved, be used in mitigation of damages. If there was a partial failure of consideration, or deception in the quality and value of it, or a breach of warranty, the defendant may avail himself of it to reduce the damages to the worth of the chattels sold, and need not resort to an action for deceit, or upon the warranty. Chitty on Contr. 140; Germaine v. Burton, 3 Stark. R. 32; Basten v. Butter, 7 East, 480; Poulton v. Lattimore, 9 Barn. & Cressw. 259; Bayley on Bills, (2d Amer. Ed.) 531, and cases cited. But he is not bound to do this. He may prefer to bring a separate action, and he has an election to do so. The present judgment will not bar such an action. But however this may be, it does not appear, that any instructions were given or refused upon this point. The value of the property to the defendant would have been the true rule of damages. And had he desired it, doubtless, such instructions would have been given. But as he did not request them, he cannot complain of their omission.

Judgment of the Court of Common Pleas affirmed.

CARY *v.* GRUMAN.

New York, 1843. 4 Hill, 625.

The action was for breach of warranty of soundness on sale of a horse. The price paid for the horse was $90, and the breach complained of was a disease in the horse's eyes. On the trial in the common pleas, after Gruman, the plaintiff, had given evidence tending to prove the warranty and the disease, the defendant, in the course of cross-examining one of plaintiff's witnesses, enquired what the horse would have been worth at the time of the sale, if he had been sound; declaring that one object of the question was, to show the amount of the plaintiff's damages, if entitled to any, under the following rule, which he contended to be the true one, viz. "that the proper measure of damages was the difference between the real value of the horse if sound, and his real value with the defect complained of." The court, though they received the answer for another purpose, overruled it for the purpose proposed as above, holding the true measure of damages to be, the difference between the price paid, and the value with the defects. Defendant took exception.

COWEN, J. * * * A warranty on the sale of a chattel is, in legal effect, a promise that the subject of sale corresponds with the warranty, in title, soundness or other quality to which it relates; and is always so stated in the declaration when this is technically framed. It naturally follows that if the subject prove defective within the meaning of the warranty, the stipulation can be satisfied in no other way than by making it good. That cannot be done except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed. There is no right in the vendee to return the article and recover the price paid, unless there be fraud, or an express agreement for a return. Voorhees v. Earl, 2 Hill, 288. Nor does it add to or detract any from the force or compass of the stipulation that the vendee may have paid a greater or less price. The very highest or the very lowest and most trifling consideration is sufficient. A promise, in consideration of $1, that a horse which, if sound, would be worth $100, is so, will oblige the promisor to pay $100 if the horse shall prove totally worthless by reason of unsoundness, and $50 if his real value be less

by half, and so in proportion. Nor could the claim be enhanced by reason that the vendee had paid $1,000.

The rule undoubtedly is, that the agreed price is strong evidence of the actual value; and this should never be departed from, unless it be clear that such value was more or less than the sum at which the parties fixed it. It is sometimes the value of the article as between them, rather than its general worth, that is primarily to be looked to—a value which very likely depended on considerations which they alone could appreciate. Things are, however, very often purchased on account of their cheapness. In the common language of vendors, they are offered at a great bargain, and when taken at that offer on a warranty, it would be contrary to the express intention of the parties, and perhaps defeat the warranty altogether, should the price be made the inflexible standard of value. A man sells a bin of wheat at 50 cents per bushel, warranted to be of good quality. It is worth $1 if the warranty be true; but it turns out to be so foul that it is worth no more than 75 cents per bushel. The purchaser is as much entitled to his 25 cents per bushel in damages as he would have been by paying his dollar, and if he had given $2 per bushel he could recover no more. So, a horse six years old is sold for $50 with warranty of soundness. If sound, he would be worth $100. He wants eyesight, and thus his real value is reduced one-half. The vendee is entitled to $50 as damages; and could recover no more had he paid $200. * * *

It is impossible to say, nor have we the right to enquire, whether the real value of the horse in question, supposing him to have been sold, would have turned out to be more or less than the $90 paid. Suppose the jury thought, with one witness whom the court allowed to state such value for another purpose, that it was not more than $80; the plaintiff then recovered $10, not on account of the defect, but because he had been deficient in care or sound judgment as a purchaser. On the other hand, had the horse been actually worth $100, the defendant would have been relieved from the payment of the $10 because he had made a mistake of value against himself. The cause might thus have turned on a question entirely collateral to the truth of the warranty. * * *

We think the court below erred, and for this reason the judgment must be reversed. We direct that a *Venire de novo* issue from that court, and that the costs shall abide the event.

Rule accordingly.

CAHEN *v.* PLATT.

New York, 1877. 69 N. Y. 348.

At the trial, verdict was rendered in favor of the plaintiff. The General Term of the Superior Court of the city of New York affirmed the judgment, from which the defendants now appeal. The action was brought to recover damages for the alleged breach of a contract of purchase and sale.

EARL, J. In September, 1872, at the city of New York, the plaintiffs sold to the defendants 10,000 boxes of glass, at seven and one-half per cent. discount from the tariff price of July, 1872, to be paid for in gold, at New York upon delivery of invoice and bill of lading, by bills of exchange on Antwerp. The glass was to be of approved standard qualities, and was to be shipped on board of sailing vessels at Antwerp, and to be at the risk of the defendants as soon as shipped, and they were to insure and pay the freight and custom duties. The glass was to be delivered during the months of October, November and December, 1872, and January, 1873. In pursuance of this contract, the plaintiff delivered to the defendants 4,924 boxes of glass, for which they paid. They refused to receive any more, and this action was brought to recover damages consequent upon such refusal.

The defendants claimed, and gave evidence tending to prove, that the glass delivered was not of approved standard quality, and hence that they had the right to refuse to take the balance.

While some months after the glass was delivered the defendants complained of its quality, they at no time offered to return it, or gave plaintiff notice to retake it. They received it under the contract, and it is not important in this action to determine, as no counterclaim is set up, whether or not a right of action for damages on account of the inferior quality of the glass survived the acceptance. The fact that the glass delivered and received upon the contract was inferior, did not give them the right to repudiate the contract altogether. They could demand better glass, and when the plaintiff offered to deliver the

balance, if it was inferior, they could refuse to accept it. But if plaintiff was ready and willing to deliver for the balance such glass as the contract called for, they were bound to receive it. Here the plaintiff requested them to take the balance of the glass, and they refused to take any more, and thus repudiated and put an end to the contract. There was no proof that the plaintiff insisted upon delivering inferior glass, or that he was not ready and willing to deliver glass of the proper quality. They did not take the position that they were willing to receive glass of approved standard quality, but refused to take any more glass under the contract. There was, therefore, such a breach of contract as enabled the plaintiff to recover such legal damages as he sustained by the breach.

The only other question to be considered is whether a proper rule of damages was laid down by the court at the trial.

The contract was made in New York, and it was doubtless contemplated by the parties that the glass would be carried to New York. But the plaintiff was not bound to deliver it there. His delivery was upon shipboard at Antwerp, and after the glass was shipped the defendants could transport it to any part of the world. It was then at their risk, and they were liable to pay for it, although it should be lost. After plaintiff had shipped the glass, all he was bound further to do, to entitle him to payment, was to present to the defendants at New York the invoices and bills of lading of the glass.

Here the balance of the glass was not actually delivered. The defendants notified plaintiff not to ship and absolutely refused to take any more, and hence the glass remained in Belgium. The general measure of damages in such a case is the difference between the contract price and the market price at the time and place of delivery. This measure is adopted as one that will generally give complete indemnity to the seller. He can dispose of the commodity contracted to be sold at the market price, and his damage will be the difference between the price thus obtained and the price he would have received if the contract had been performed. Evidence as to the price need not be confined to the precise time when the contract was to have been performed. It may sometimes be impracticable to show the price at the precise time, and hence evidence of the price for a brief period before and after the time may be given, not for the purpose of establishing a market price at any other

time, but for the purpose of showing as well as practicable the market price on the day the contract was to have been performed. So it may not always be practicable to show the price at the precise place of delivery. There may have been no sales of the commodity there, and hence evidence of the price at places not distant, or in other controlling markets may be given, not for the purpose of establishing a market price at any other place, but for the purpose of showing the market price at the place of delivery. (Dana v. Fiedler, 12 N. Y. 40; Dustan v. Mc Andrew, 44 N. Y. 72; Durst v. Burton, 47 N. Y. 167.) Here there was no difficulty. There was a market price at the place of delivery. The defendants proved that the market price there was thirty-seven and one-half per cent. off from the tariff rate, and the plaintiff proved that the market price in New York was fifty per cent. off. The court charged the jury that the plaintiff was entitled to recover the difference between the contract price and the market price in the city of New York, and this charge gave the plaintiff several thousand dollars more than he could upon the evidence have recovered if the court had charged that the market price at Antwerp should be taken instead of that at New York. In this charge, which was properly excepted to, the court erred, and for this error the judgment must be reversed and new trial granted, costs to abide event.

All concur.

Judgment reversed.

HAMMOND *v.* BUSSEY.

Court of Appeal, 1887. 20 Q. B. Div. 79.

Action for breach of warranty on a contract to supply coal.

Lord Esher, M. R. In this case the plaintiffs bought from the defendant "steam-coal," which was to be coal suitable for use on steamers. At the time when the defendant sold the coal, he knew that the plaintiffs were buying the coal in order to sell it again to the owners of steamers calling at Dover to be used as steam-coal on such steamers; and he therefore knew that the plaintiffs would enter into contracts with others similar to the contract he himself had made with the plaintiffs, that is to say, into contracts for the sale of steam-coal, which would amount to a warranty that the coal was reasonably fit to be used for the purpose of steam-coal on board steamers.

He did not know, it is true, with what specific persons the plaintiffs would make such contracts, but that seems to me immaterial. The defendant supplied under the contract coal that was not reasonably fit to be used as such steam-coal, that is to say, something different from that which he had contracted to supply. The fact that this was so was not a fact which would be patent to the plaintiffs on inspection of the coal; it could only be found out when it came to be used, which was not by the plaintiffs, but by their sub-vendees. Such a breach of such a contract with regard to such a subject-matter necessarily made the plaintiffs liable to an action by their sub-vendees, and the result was the plaintiffs were sued for damages by their sub-vendees. The plaintiffs, when sued, would be in the difficulty that they had no opportunity, at the time when they entered into the sub-contract, or when they delivered the coal, of knowing whether the coal answered the description given in such sub-contract. What then was the plaintiffs' position? Was it reasonable that they should take the mere word of the persons making a claim upon them that the coal was, not merely bad, but so bad that it could not reasonably be considered fit for use as steam-coal on steamships? Was it reasonable that they should, whether they were dealing with the matter on their own account or on account of the defendant, submit to such a claim without having in any way tested it?

If the defect in the coal had been one which would have been patent on inspection, and which the plaintiffs could have seen before they sold the coal again, the case might have assumed a different aspect. That not being so, the plaintiffs would have nothing to rely upon at first but the mere words of the sub-vendees. Under those circumstances it would not have been reasonable, either on their own account or on that of the defendant, for the plaintiffs to submit to judgment at once without defending the action or testing the claim in any way. If they were to defend the action, of course they would not be sure to win; whether they would win or lose would depend on the extent to which the evidence went as to the quality of the coal, of which the plaintiffs could not judge, and which they probably could not satisfactorily ascertain or prove without the assistance of the defendant. In order to make themselves as safe as possible in this respect, the plaintiffs gave notice of the claim against them to

the present defendant, and thereupon the defendant insisted that the coal he had supplied was according to contract. The value of that fact is to show the plaintiff's position, and to make it still more reasonable that they should defend the action by their sub-vendees against them. They accordingly defended the action, and of course would become liable to costs in that action, if, by reason of any breach of contract by the defendant, the defence was unsuccessful. That defence appears to have turned entirely on the question of breach of warranty. There is nothing to show that it depended on anything else, or that any damages were given except for the breach of warranty. The defendant has admitted that the damages given in that action were merely the damages naturally resulting from the breach of warranty, for he has paid the amount of them into court in this action. Furthermore, it is not suggested that the costs which the plaintiffs incurred were extravagantly or recklessly incurred, or that they are anything but fair and honest costs of a fair and honest defence. The plaintiffs sue the defendant for the damages occasioned by his admitted breach of contract, viz., in supplying coal not according to contract. The question is, what are the damages which they can recover? We find the rule of law as to measure of damages enunciated in the case of Hadley v. Baxendale. It may be that the rule so laid down was not necessary for the purpose of deciding that case, but it is far too late to question it. The rule, though frequently commented upon, has been over and over again adopted by the courts, and must now be considered to be the law on the subject. We must therefore treat the present case on the footing that the question is as to the true application of that rule to the measure of damages for such a breach of such a contract under such circumstances as we have to deal with here. We have not got to determine how that rule would apply to other breaches of other contracts under those circumstances than those we have now to consider. The rule is laid down thus: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract"—it is to be observed in passing that the rule is not contemplating a breach of a contract to pay damages, but the damages which are recoverable in respect of a breach—"should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of

things, from such breach of contract itself." That is the enunciation of the rule with regard to damages for a breach of contract where no special circumstances arise, and would apply to this case if there had been no sub-contract which the defendant knew to exist or to be likely to be made. The rule goes on to state what the measure of damages is where there are special circumstances, as follows: "or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." It has been argued that these words are not an enlargement of the former part of the rule, but I cannot take that view of them. It is to be observed that the words are not "such damages as were in fact in the contemplation of the parties at the time they made the contract," which would have raised a question of fact for the jury, but "such as may reasonably be supposed to have been in the contemplation of the parties," not as the inevitable, but as "the probable result of the breach." The next sentence of the judgment is, I think, to be considered rather as a valuable exemplification of the rule, an illustration of the circumstances under which the second branch of the rule would apply, than as part of the rule itself. It proceeds: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." I do not think that there is anything in those words to show that the second branch of the rule must be confined to the case of a sub-contract already actually made at the time of the making of the contract, and would not apply to the case of a sub-contract not yet actually made, but which will probably be made. I think that this sentence must be looked upon as intended to be an exemplification of the second branch of the rule already stated rather than as part of it; and in any case it seems to me clear that the rule would apply to the case of a sub-contract which within the knowledge of the defendant was in the ordinary course of business sure to be made. We have to apply that rule to the sale and purchase of such an article with such a warranty as that now in question, with the knowledge on the part of the vendor that there would be a sub-

sale by the vendees with a similar warranty; and to see whether, under these circumstances, the bringing of an action by the sub-vendees in the event of there being a breach of the warranty by the vendees, and the defence of such action by the vendees, are consequences that may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of the breach of it. Such a question is one upon which those who have to determine it must exercise their minds according to the circumstances of the particular case. It is impossible for us to lay down a rule as to what would be reasonably to be supposed to have been in the contemplation of the parties in the cases of other contracts made with regard to other subject-matters under other circumstances. We can only apply the rule laid down as above stated to the circumstances of the case before us. We must say, using our knowledge of business and affairs, what may reasonably be supposed to have been in the contemplation of the parties as the result of a breach of the contract under the circumstances. I do not think that the question is one for a jury, though I think that possibly, under certain circumstances, with regard to some subject-matters, it would be competent to a judge to ask particular questions of a jury in order to assist him in coming to a conclusion on such a question. There are, however, no such circumstances here. I cannot doubt that any business man would contemplate, as being, according to the ordinary course of things under the circumstances, not only the probable but the inevitable result of such a breach of contract, that there would be a lawsuit by the sub-vendees, and that the reasonable course to be pursued by the vendees might be that they should not at once submit to the claim, but that, unless they could get information from the vendor that there was really no defense, they should defend the action. It would not, of course, be the inevitable result that the vendees should lose the action; that would depend on the question whether there was a breach of the warranty, and whether, if so, it could be proved. If, however, it were proved, then of course the result would be that the vendees must incur costs; and it seems to me that such costs would under the circumstances come within the second branch of the rule in Hadley v. Baxendale.

It has been argued that, upon the true construction of the rule in that case, such costs cannot be recoverable as the result of

a breach of contract, unless there has been a contract of "indemnity." The meaning of that term has been much discussed during the argument. I may in previous cases, in which the question was as to the damages incurred by reason of the breach of a contract, where there was a sub-contract, have used expressions to the effect that, where the special circumstances were known to the original vendor, the law would imply a contract to indemnify. I do not feel sure, having regard to the language used by Willes, J., in Collen v. Wright, 8 E. & B. 657, that the obligation implied by the law under such circumstances as those with which we are now dealing might not be correctly expressed by that formula; but I purposely abstain from so deciding. I do not think it necessary to put the case on that footing, inasmuch as the way in which I have put it, by applying the rule in Hadley v. Baxendale, viz., that the question is whether the damages claimed may reasonably be supposed to have been within the contemplation of the parties at the time when they made the contract, seems to be another and perhaps a better way of expressing it. For the purpose of substantiating the argument that there must be a contract to indemnify, express or implied, in order to enable costs such as these to be recovered as damages, expressions used in previous cases have been referred to. The language used by me in the case of Grébert-Borgnis v. Nugent, 15 Q. B. D. 85, has been relied upon for the defendant. But that language must be read in connection with the subject-matter. I was there giving an account of the circumstances of that case, as I have given an account of the circumstances of this case, and I used that language in expressing what I conceived to be the particular circumstances of that case, which made the rule in Hadley v. Baxendale applicable. It seems to me immaterial whether the phraseology I used in so doing was exactly accurate, for, if the circumstances of that case did come within that rule, it comes to the same thing. There was nothing said by me in that case which really adds anything to or takes anything from the rule enunciated in Hadley v. Baxendale as applicable to a case like the present. The case of Birmingham, &c., Land Co. v. London and North-Western Railway Co., 34 Ch. D. 261, was referred to for the same purpose. It is only necessary to say with regard to that case that the court was not there construing the rule as to damages laid down in Hadley v. Baxendale, but the provisions of Order XVI., rule 48, with regard to the question whether the third party procedure was ap-

plicable. It does not seem to me that such a case has any bearing upon the present question. There are cases which would, no doubt, be authorities on the question before us but for the fact that they were decided prior to Hadley v. Baxendale. Lewis v. Peake, 7 Taunt, 153, is such a case, but I do not think such decisions are now of any use. It seems to me that the case of Collen v. Wright, 8 E. & B. 647, is really a strong authority with regard to the question now before us, though of course the court were not there dealing especially with the rule as to measure of damages. Then I come to the case of Baxendale v. London, Chatham, and Dover Ry. Co., Law Rep. 10 Ex. 35. If I thought that that case had decided that, however reasonably it might be supposed that the parties contemplated that there would be an action on the sub-contract as a result of the breach of contract, and that the plaintiffs, acting as reasonable men, would defend that action, and however reasonable the incurring of the costs might be, yet those costs could not be recovered as damages, I should feel bound by that decision, for it is a decision of a court of co-ordinate jurisdiction. And I must admit that I have felt considerable anxiety as to whether the decision does touch the point now before us. It is useless to discuss at length all the verbal criticism which has been directed during the argument to the language of the judgments in that case. I must confess to feeling some difficulty as to the exact effect of much that was said in those judgments, but I think it is quite clear that what the court did in effect decide was that the costs in question were not reasonably incurred in that case, and therefore they could not be recovered. The case therefore decides that, where the costs are unreasonably incurred, they cannot be recovered, but it is not, as it seems to me, a decision that, where the costs were under all the circumstances reasonably incurred, they cannot be recovered. I then come to the case of Fisher v. Val de Travers Asphalt Co., 1 C. P. D. 511. I must admit, after the discussion that has now taken place, that I doubt whether, when that case came before the court, I did quite correctly appreciate what was decided and what was not in the case of Baxendale v. London, Chatham, and Dover Ry. Co., *supra*. Assuming that I did not in that case take an altogether correct view of the decision in Baxendale v. London, Chatham, and Dover Railway Co., and therefore gave a wrong reason for the decision there, that could have no effect upon the true meaning of the previous

decision; and it by no means follows that, because a reason given for the decision in Fisher v. Val de Travers Asphalt Co. was wrong, that therefore the decision itself was wrong. It is unnecessary, however, now to discuss that question. It does not seem to me that there is really any case which alters the rule as laid down in Hadley v. Baxendale, or which prevents our applying that rule in the terms in which it stands in the judgment there given as I have applied it to the present case. To my mind it is perfectly clear that, according to a reasonable business view of the reasonably probable course of business, the parties may be supposed to have contemplated, at the time when the contract was made, as the inevitable or at any rate the highly probable result of a breach of it, that there would be a lawsuit between the plaintiffs and their subvendees, in which it would be reasonable for the plaintiffs to defend, and in which, if it turned out that there was a breach of the warranty, the plaintiffs would lose, and that they would thereby necessarily incur costs. Costs incurred under such circumstances appear to me to fall within the second branch of the rule in Hadley v. Baxendale. I therefore think that the plaintiffs were entitled to recover over from the defendant in respect of their costs, and that the decision of the learned judge below was right, and should be affirmed.

BOWEN, L. J., and FRY, L. J., wrote concurring opinions.

PARK *v.* RICHARDSON

Wisconsin, 1895. 91 Wis. 189.

Appeal from a judgment of the circuit court.

The plaintiffs bought of the defendant a furnace for heating their building. The furnace was warranted to work satisfactorily. It did not work satisfactorily. The plaintiffs brought this action for a breach of warranty. The court instructed the jury that, in case they found for the plaintiffs, "the plaintiffs will be entitled to recover the difference between the purchase price of the furnace * * * and its actual value.

NEWMAN, J. When this case was here before (81 Wis. 399), it was said that the proper rule of damages for breach of the warranty of the furnace would be "the difference between its actual value and its value had it conformed with the warranty." This is undoubtedly the true rule. Suth. Dam. (2d Ed.)

§ 670; Morse v. Hutchins, 102 Mass. 440. The rule stated by the trial court is not the equivalent of the true rule. The rule of the trial court deprives the purchaser of the profit of his bargain, if he has made a good one, and gives him an undue advantage, if he has made a bad one. The furnace may have been either cheap or dear, at the price paid, even if it had conformed to the warranty. If it was a bad bargain, aside from the defects complained of, the plaintiffs' damages are less than if it had been a good bargain. This consideration is an element in the rule of damages. The question of the value of the furnace, if it had conformed to the warranty, should have been left to the jury, as well as the question of its actual value. The defendant may have suffered by the error. *Reversed.*

HENDRICKSON *v.* BACK.

Minnesota, 1898. 74 Minn. 90.

COLLINS, J. * * * The question, which from the order and the briefs, we suppose is in controversy, is what is the measure of damages where there has been a breach of an implied warranty against incumbrances on personal property, and the vendee has been deprived of such property by an assertion of the paramount title or right,—in this instance, by the foreclosure of a mortgage? From the order it seems that the charge to the jury was that the vendee was entitled to recover as damages the value of the property when it was taken from him, and damages were awarded on this basis, and that in passing upon the motion the court held its charge to have been erroneous, and that it should have stated that the vendee's damages were the price paid for the chattel.

Unless we are to lose sight of the cardinal principle which governs when estimating and awarding damages in civil actions, which is simply compensation to the injured party, the court was right in its charge, and wrong when it concluded that an error had been committed. It was held in Close v. Crossland, 47 Minn. 500, in a case involving this very question, that the damages are the actual loss, which is the value of the chattel purchased. Of course, there might be circumstances which would affect any particular case. Under the rule established by the granting of the motion, the damages actually sustained might be more or might be less than the recovery, depending on the

real value of the chattel when the paramount title was asserted as against the vendee; that is, whether the real value was more or less than the price paid. A good illustration of this is found in the present case.

Defendant purchased in 1892, agreeing to pay $75 for the harvester and binder in question. He gave his note for this sum to his vendor, plaintiff's intestate, and the note in suit was given in renewal in 1894. The machine was mortgaged, but no claim for possession was asserted until 1895, and it was then worth but $25. Defendant had the possession and the use for three years, during which time the property would materially decrease in value. His actual loss when the paramount title or right was asserted was the value of the property when taken away from him, and his loss would have been the same if he had bought the machine for $10 in 1892 * * *

In conclusion, we observe that the rule above stated as the true one is in harmony with those applied where there has been a breach of warranty of quality, or where delivery of goods purchased has been refused. *Order affirmed.*

BOSTOCK *v.* NICHOLSON.

L. R. 1 K. B. 1904, 725.

Action to recover damages for fraudulent misrepresentation and breach of contract on sale of sulphuric acid commercially free from arsenic.

The case came on for further consideration as to the damages recoverable from the defendants.

Damages were claimed under the following heads:—

1. The price paid for the acid supplied which contained arsenic, which was worthless to the plaintiffs.

2. The value of material used for the purpose of making glucose and invert which was spoilt by being mixed with acid containing arsenic.

3. Compensation for the loss of the goodwill of the plaintiffs' business.

4. The damages which the plaintiffs were liable to pay to the brewers who had been supplied by the plaintiffs with glucose and invert made out of acid containing arsenic.

BRUCE, J., read the following judgment:—The judgment al-

ready delivered found that there was a contract for the sale of goods by description within s. 13 of the Sale of Goods Act, 1893—that is, a sale of B. O. V. commercially free from arsenic, and that there was an implied condition that the goods supplied should correspond with that description; and when the defendants, in March, 1900, delivered B. O. V. which was not commercially free from arsenic, there was a breach of the implied condition. It was further found by the judgment that the buyer did not expressly, or by implication, make known to the seller the particular purpose for which the goods were required, so as to bring into operation sub-s. 1 of s. 14 of the Sale of Goods Act. The question now arises, what are the damages which the plaintiffs are entitled to recover against the defendants? The plaintiffs claim, first, the price paid for the acid supplied, which was not commercially free from arsenic. They say that the acid was worse than useless to them, and that the price paid for it was wholly thrown away. Secondly, the plaintiffs claim the value of the material used for the purpose of making glucose and invert, which was spoilt by its being mixed with acid which proved to be poisonous at a time when the plaintiffs supposed the acid to be commercially free from arsenic. Thirdly, the plaintiffs claim a large sum of money as compensation for the goodwill of the business which the plaintiffs carried on as manufacturers of invert and glucose, and which the plaintiffs say has been entirely destroyed by the act of the defendants in supplying them with poisonous acid. Fourthly, the plaintiffs, before they discovered the poisonous properties of the acid, sold to brewers, for the purpose of being used in the brewing of beer, invert and glucose made from the poisonous acid, and they claim from the defendants the amount of damages which the brewers are entitled to recover against them.

In order to arrive at the damages which the plaintiffs are entitled to recover, we must consider the provisions of the Sale of Goods Act, 1893. Sect. 11, sub-s. 1 (a), enacts that where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty. In the present case the plaintiffs, the buyers, accepted the acid in ignorance that it did not fulfil the condition that it was commercially free from arsenic. Had they known of the breach of condition, they might have refused to accept the goods; but

having accepted the goods in ignorance of the breach of condition, I think the case is one to which s. 11, sub-s. 1 (c), applies. That sub-section enacts that where the property has passed to the buyer the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty in the absence of a special term to the contrary. Sect. 53, sub-s. 1, enacts that where the buyer is compelled to treat any breach of a condition on the part of the seller as breach of warranty the buyer may (b) maintain an action for damages for the breach of warranty. Sub-sect. 2 enacts that the measure of damages for breach of warranty is the estimated loss indirectly and naturally resulting, in the ordinary course of events, from the breach of warranty. Sub-s. 3 of s. 53, which relates only to a breach of warranty of quality, has I think, no bearing in the present case. Nichol v. Godts, 10 Ex. 191, and Josling v. Kingsford, 13 C. B., (N. S.) 447, illustrate the distinction between a mere warranty of quality and a condition that the goods shall correspond with the description. Although in circumstances such as have happened in this case the buyer is compelled to treat the breach of the condition as a breach of warranty, yet in point of fact the damages for such breach of warranty are different from the damages which follow from a mere breach of warranty of quality.

The damages in the present case must, I think, be determined by the rule laid down in s. 53, sub-s. 2. Before I proceed to consider the meaning and application of this sub-section, I may refer to s. 54, which enacts that nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable. These two sections seem to be framed upon the rules laid down in Hadley v. Baxendale, 9 Ex. at p. 354.

(The learned Court here reviews the authorities).

In my opinion the plaintiffs are entitled to recover, first, the whole price paid by them for the impure acid, because the acid being worthless to the plaintiffs there was an entire failure of consideration, and by virtue of s. 53, sub-s. 1 (a), Sale of Goods Act, where there is a breach of warranty by the seller, the buyer may set up against the seller the breach of warranty in extinction of the price: see Poulton v. Lattimore, (1829) 9 B. & C. 259; 32 R. R. 673. Second, the value of the goods that were rendered useless by being mixed with the poisonous acid at a time

when the plaintiffs were ignorant of the poisonous character of the acid. That, I think, is a loss directly and naturally resulting in the ordinary course of events from the breach of warranty.

The claim of the plaintiffs for the loss of the goodwill of their business is not, I think, recoverable. It does not seem to me to be a loss directly and naturally resulting in the ordinary course of events from the breach of warranty. It did not arise directly from the act of the defendants, but arose from the act of the plaintiffs in selling the poisonous glucose and invert to brewers for use in the brewing of beer. The poisonous glucose and invert were not supplied by the defendants to the plaintiffs, but were manufactured by the plaintiffs; the damage to their credit arose, not directly from any act of the defendants, but arose from the act of the plaintiffs in manufacturing glucose and invert by means of poisonous acid, and selling the glucose and invert so made as fit to be used in the brewing of beer. In Randall v. Raper, E. B. & E. 84, there was an allegation in the declaration that the plaintiffs had been and were by means of the premises injured in their credit, in their said trade, and otherwise, and had been and were otherwise injured. And no doubt in point of fact the selling of inferior barley would tend to injure the credit of the plaintiffs in their trade as corn-factors, yet no one seems to have contended that the damages under that head were recoverable. So in Fitzgerald v. Leonard, L. R. Ir. 32 C. L. 675, it was held that damages for loss of trade could not be recovered.

Further, I think that the plaintiffs are not entitled to recover against the defendants the sums which the brewers to whom the plaintiffs sold the glucose and invert made from the poisonous acid are entitled to recover against them. I think the rule is correctly laid down in Smith's Leading Cases in the note to Vicars v. Wilcocks, 2 Sm. L. C. 11th ed. p. 521, that no liability is incurred in the ordinary case of a separate and distinct collateral contract with a third person uncommunicated to the original contractor or wrong-doer although the non-performance of this contract may in one sense have resulted from the original wrongful act or breach of contract. In my opinion there are no special circumstances to entitle the plaintiffs to claim special damages under s. 54 of the Sale of Goods Act.

The damages, therefore, will be confined to the two items I have mentioned—(1) the price paid for the impure acid; (2)

value of the goods spoilt by being mixed with the impure acid. I have not gone into the figures, but I understand they can easily be agreed upon.

Judgment for the plaintiffs.

ISAACS *v.* WANAMAKER.

New York, 1908. 189 N. Y. 122.

EDWARD T. BARTLETT, J. The referee found that on the 26th day of July, 1904, the defendant sold to the plaintiff a Searchmont touring car with certain appurtenances; that at the time of the sale the plaintiff paid to defendant the entire purchase price of $1,200; that the defendant made certain representations and statements to plaintiff in respect to the machine before the purchase thereof which constituted a warranty; that the defendant was guilty of a breach of the same upon which the plaintiff relied; and that it subsequently proved to be untrue. It is further found that upon the discovery of the breach of warranty when the car arrived in Niagara Falls plaintiff promptly rescinded the contract, and offered to return the machine and appurtenances, and demanded the repayment of the purchase price. The referee held, as matter of law, that the plaintiff had properly rescinded the contract and was entitled to recover of the defendant the purchase price of $1,200 and interest, and the further sum of $31.20, with interest, being the amount of freight paid for transporting said car from the city of Philadelphia, where it was purchased, to the city of Niagara Falls, where the plaintiff resides.

The plaintiff's damages were awarded on a wrong theory, and the judgment must be reversed. The action is based upon an alleged rescission of the contract, and the right of the plaintiff to recover the purchase price as such, and certain freight charges. The findings present a contract of sale, fully executed, accompanied by an express warranty. It has long been the settled law of this state that, where an article is delivered to the purchaser with an express warranty, the measure of the purchaser's damages on the breach thereof is the difference between the value of the article if it had been as warranted and actual value. Voorhees v. Earl, 2. Hill, 228; Cary v. Gruman, 4 Hill, 625; Muller v. Eno, 14 N. Y. 597; Rust v. Eckler, 41 N. Y. 488. The defendant is entitled to litigate the questions of breach of

warranty and the value of the article sold and delivered, even if it were proved that there had been a breach.

The judgments of the Special Term and Appellate Division should be reversed, and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and GRAY, HAIGHT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur. *Judgment reversed.*

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(2) *Breach of Vendee.*

GANSON *v.* MADIGAN.

Wisconsin, 1862. 15 Wis. 158.

Appeal from circuit court, Dodge county.

Action by Ganson, Huntley & Co. against one Madigan to recover for the price of a reaping machine alleged to have been delivered on his written order. In giving instructions to the jury, the judge said: * * * If you find that the plaintiffs did deliver a machine according to agreement, then they are entitled to recover whatever damages they have sustained by the defendant's refusal to receive. The rule of damages is the difference between the contract price and the actual value of the reaper on the 1st of July, 1855, the day specified for the delivery, together with any expenses incurred by the plaintiff."

The rights and liabilities of the parties under the contract were, in substance, these: The plaintiffs were bound to manufacture and deliver the machine in the manner specified, at the city of Milwaukee, on or before the first day of July. The defendant was bound, on the same day (or before, if notified of its earlier delivery, and he chose to do so), to be present to receive it, and pay the fifty dollars and the storage. The obligation of the plaintiffs to manufacture and deliver, and that of the defendant to be present and receive and pay, were mutual and concurrent. The presence of both parties, by themselves or agents, at the time and place designated, was necessarily contemplated, since the obligations resting upon them respectively could not otherwise be discharged. The plaintiffs, if they had manufactured and furnished ready for delivery by their agents at Milwaukee, such a machine as the contract called for, would have so far performed the duty imposed upon them as to be

entitled to damages for the defendant's violation of duty in neglecting to be present, accept and pay the sums stipulated. For this purpose it was not necessary for them to set apart the machine so as to vest the title in him subject to their lien for the purchase money and charges. Having manufactured and forwarded the machine upon the faith of his promise to receive and pay for it, it would be most unreasonable and unjust to say that they should not have compensation for any actual loss or expense which they had thus incurred. The defendant, by his failure to appear and perform the contract on his part, would have been in no situation to insist upon an actual delivery or separation of the machine. Delivery and payment were concurrent acts, the one dependent on the performance of the other, and the neglect of the latter effectually excused the former. It would have been enough to have enabled the plaintiffs to recover their actual loss and expenses, if they had shown that they were ready and willing to perform the contract on their part. Chitty on Con., 633. As stated by Mr. Parsons (2 Parsons on Con., 484,) they had under the circumstances, three courses open to them; to consider the machine as their own (which they did, by not setting it apart, so as to constitute a delivery), and sue for the damages occasioned by the non-acceptance; or to consider it as the defendant's (which they might have done, by separating it from the others so as to be capable of identification), and sell it, with due precaution, to satisfy their lien on it for the price, and then sue and recover only for the unpaid balance of the price; or in the latter case, also, to hold it subject to defendant's call or order, and then recover the whole price which he agreed to pay. We deem these principles to be sound and well supported by the authorities, and are willing to stand by them. The rule of damages given by the court below was therefore correct, and the judge was right in refusing the instruction asked by the appellants on that subject.

The case is clearly distinguishable from those in which the counsel suppose a different rule was established. They will all be found, on examination, to have been cases where the articles purchased or manufactured were, from their nature, susceptible of being distinctly known and identified, or where they were set apart by the vendors, so that the vendees, on paying the price, could receive and dispose of them if they desired. Such was the case of the wood work of the wagon, in Crookshank v. Burrell, 18

Johns., 58; the carriage, in Mixer v. Howarth, 21 Pick., 205; the sulky, in Bement v. Smith, 15 Wend., 493; and the promissory note, in Des Arts v. Leggett, 16 N. Y., 582. As was decided in the last case, the vendor, choosing to go for the price, becomes, after a valid tender of the chattel in performance of the contract, a bailee for the vendee. But we know of no principle of law which would allow the vendor to keep the goods as his own, and at the same time come upon the vendee for the price—compel the latter to pay for, and yet not get the property; which would be the case were the present plaintiffs to be permitted to recover the price irrespective of the amount of damages which they had sustained in consequence of the defendant's nonacceptance. The machine here was brought to Milwaukee in pieces, its several parts separated and packed with those of a great number of other machines of identical form and pattern, so that the same part of one machine was equally suited to every other. It remained in this condition until after the day fixed for its delivery and acceptance. It is idle, therefore, to talk about there having been such a delivery as would have vested the title in the defendant, provided the jury had found that the machine was such as the contract called for. The property in all the machines remained in the plaintiffs, subject to their absolute dominion and right of disposal. Nothing could have changed it as to the defendant, short of a separation or distinct ascertainment, by mark or otherwise, of the machine intended for him, so that he could afterwards, on paying the price, have obtained it if he chose. * * *

The jury, upon proper evidence and under proper instructions, having found that the machine delivered at Milwaukee was not such as the contract called for, the judgment upon their verdict must be affirmed.

Ordered accordingly.

DUSTAN *v.* McANDREW.

New York, 1870. 44 N. Y. 72.

Action for breach of contract, for refusal to take 100,000 pounds of hops according to contract. At the trial it was shown that the hops in all respects answered the contract.

On August 24, 1860, J. S. & W. Brown of New York executed the following agreement with the plaintiff:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we have sold this day to Mr. John F. Dustan, of this city, 100,000 pounds of first sort western or eastern hops, as we may select; growth of 1860; deliverable in the city of New York, at our option, during the months of October or November, 1860, at seventeen cents per pound, subject to Mr. J. S. Brown's inspection, or other mutually satisfactory. Terms, cash on delivery. Mr. Dustan's name to be made satisfactory either by indorsement or by a deposit of $2,500 by both parties.

"J. S. & W. BROWN."

On the 7th of September, plaintiff sold this contract to defendants under the following instrument in writing:

"In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I have this day sold to McAndrew & Wann the contract of J. S. & W. Brown, dated 24th August, 1860, for 100,000 pounds first sort hops, western or eastern, growth of 1860; upon condition that the said McAndrew & Wann fulfill the conditions of said contract to the said J. S. & W. Brown, and pay to me, in addition, on delivery of the hops, ten and one-half cents per pound.

"JOHN F. DUSTAN."

Prior to November 30, John S. Brown inspected and branded the hops and certified that they conformed to the contract. On November 30, J. S. & W. Brown were ready and willing to deliver said hops, and defendants were so notified, but refused to take them, because they had not had an opportunity to inspect them, and because Messrs. Brown had refused to let defendants' inspector inspect the hops. On December 24, plaintiff took and paid for the hops, and immediately notified the defendants the same were in store for them at No. 4 Bridge street; that unless they complied with the terms of the contract of the 7th of September on or before December 26, they would sell the same on their account and hold them for any deficiency. Defendants still declining to take the hops, they were sold at a fair sale for twenty cents per pound.

Verdict was directed for plaintiff for $8,130 and was sustained by the General Term of the Superior Court of the city of New York, and defendants appealed to this court.

EARL, C. The contract required that the hops should be inspected by J. S. Brown, or some other inspector satisfactory to

both parties. In case J. S. Brown could not, or should not inspect them for any reason, then they were to be inspected by some other person mutually satisfactory. Neither party had the right to demand any other inspector, unless Brown neglected or refused to inspect. It is doubtless unusual to insert a stipulation in contracts, that the vendor shall inspect the goods sold. But where parties agree to this, they must be bound by their contract, and it must be construed the same as if some other person had been chosen inspector.

It is claimed on the part of the respondent, and was held by the court below, that the inspection provided for was intended simply for the convenience of the vendors, to enable them to perform their contract, and that it merely furnished *prima facie* evidence that the hops answered the contract, and that the inspection was not conclusive upon the parties. I cannot assent to this. The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties, whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and when so delivered, the vendors were entitled to the purchase price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at, and after performance. But if the inspection was merely for the convenience of the vendors, then they could dispense with it, and compel the vendees to take the hops without any inspection whatever. And if it was merely *prima facie* evidence of the quality of the hops, then it was an idle ceremony, because, not being binding, the vendee could still dispute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be entirely defeated.

The inspection could be assailed for fraud, or bad faith in making it, and perhaps within the case of McMahon v. The New York & Erie Railroad Co., 20 N. Y. 463, because made without notice to the vendee. The inspection here was made without notice; but it is not necessary to determine whether this renders it invalid, as no such defense was intimated in the answer or upon the trial.

By the purchase of the contract the defendants were substi-

tuted, as to its performance, in the place of the vendee therein named, and were bound to do all that he had agreed to do or was bound in law to do. When notified that the hops were ready for delivery they declined to take them, upon the sole ground that they had not had an opportunity to examine or inspect them; and they claimed that they had sent one Smith to inspect them, and that he had been declined permission to inspect them. There was no proof, however, that they ever tried to examine or inspect the hops, or that the vendors ever refused to permit them to examine or inspect them. They sent Smith to inspect them, and he went to one of the several store-houses where some of the hops were stored, and he says he was there refused an opportunity to inspect them by Mr. A. A. Brown. But there is no proof that he was in any way connected with the vendors, or that he had any agency or authority whatever from them. There was no proof that defendants ever tried with the vendors to agree upon any other inspector, or that they ever asked the vendors to have the hops inspected by any other inspector, and they made no complaint at any time that they were inspected without notice to them. The point that they should have had notice of the inspection was not taken in the motion for a nonsuit, nor in any of the requests to the court to charge the jury. If the point had been taken in the answer or on the trial, the plaintiff might, perhaps, have shown that notice was given by the vendors, or that it was waived.

Hence we must hold, upon the case as presented to us, that there was no default on the part of the plaintiff or the vendors, and that the defendants were in default in not taking and paying for the hops. The only other question to be considered is, whether the court erred in the rule of damages adopted in ordering the verdict.

The court decided that the plaintiff was entitled to recover the difference between the contract price and the price obtained by the plaintiff upon the resale of the hops, and refused, upon the request of the defendants, to submit to the jury the question as to the market value of the hops on or about the 30th day of November.

The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1). He may store or retain the property for the vendee, and sue him

for the entire purchase price. (2). He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3). He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price. (2 Parsons on Con. 484; Sedgwick on Dams. 282; Lewis v. Greider, 49 Barb. 606; Pollen v. LeRoy, 30 N. Y. 549.) In this case the plaintiff chose and the court applied the second rule above mentioned. In such case, the vendor is treated as the agent of the vendee to make the sale, and all that is required of him is, that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence. Here it is conceded that the sale was fairly made; it was made in the city of New York, in less than one month from the time the defendants refused to take the hops. It was not claimed on the trial that the delay was unreasonable and we can find nothing in the case to authorize us to hold that it was unjustifiable. We are, therefore, of the opinion, that the court did not err as to the rule of damages.

The judgment should therefore be affirmed with costs.

For affirmance, LOTT, Ch. C., EARL and HUNT, CC. GRAY, C., was for reversal, on the ground that the delay in selling was too great.

LEONARD, C., did not vote.

Judgment affirmed with costs.

BRIDGFORD *v.* CROCKER.

New York, 1875. 60 N. Y. 627.

Action by James Bridgford against Lemuel L. Crocker to recover damages for the refusal of one Gavin to receive certain cattle which plaintiff claimed he had purchased as agent, and to recover also the amount of a check drawn in favor of Gavin, and by him indorsed to plaintiff, in payment for certain other cattle delivered by plaintiff to said Gavin, and received by him. Plaintiff held the cattle which Gavin had refused to receive until the following spring, when he sold them at an advanced price, and

defendant claims the benefit of such sale. There was a judgment in favor of plaintiff, and defendant appeals.

GROVER, J. The questions raised upon this appeal by the counsel for the appellant arise upon the defense sought to be made against his liability to the plaintiff as drawer of the check upon which the action was brought. The case shows that the check in suit was one of a large number made by the drawers in the spring and summer of 1867, amounting in all to $50,000, payable to the order of Gavin, which during the spring and summer were delivered by the drawers to Gavin, upon an agreement, as they claimed, that he should use them in the west in the purchase of stock by him for the drawers, take such stock to and sell it in Chicago, and remit the proceeds to the drawers for the payment of the checks, and that he should receive for his services in transacting the business a portion of the profits.

The rule of damages as to the cattle not taken by Gavin of the plaintiff, pursuant to the contract, was correct. That was that the plaintiff was entitled to recover upon the failure of Gavin to take and pay for the cattle, as required by his contract, the difference between the contract price and the then market value. The plaintiff had a right to tender the cattle, and sue Gavin for the price agreed to be paid, or he could, at his election, keep the cattle as his, and recover his damages for the breach the difference between the contract price and then market value. Sedgw. Dam. (5th Ed.) 313, and cases cited in note 3. The plaintiff in the present case chose to adopt the latter course, and, in case the market fell subsequently, it was his loss; if it improved, it was his gain. The time at which the damages were to be fixed, when the vendor, as in the present case, chooses to retain the property, is that fixed for the performance of the contract. Dustan v. Andrew, 10 Bosw. 130. So far as it countenances any different rule in this respect, it was not well considered, and cannot be regarded as law. It matters not to the defendant what the plaintiff got for the cattle six months or any other time after the breach of the contract by Gavin to take and pay for them. It appears that cattle rose in the market after this. This was the good fortune of the plaintiff, of which the defendant cannot avail himself.

Judgment affirmed.

KADISH *v.* YOUNG.

Illinois, 1883. 108 Ill. 170.

This was an action of assumpsit. A trial was had, resulting in a verdict and a judgment of $20,000 damages against the defendants.

SCHOLFIELD, J. This was assumpsit, by appellees, against appellants, to recover damages sustained by the breach of an alleged contract, whereby, on the 15th of December, 1880, appellees sold to appellants 100,000 bushels of No. 2 barley, at one dollar and twenty cents per bushel, to be delivered to appellants, and paid for by them, at such time during the month of January, 1881, as appellees should elect. Appellees tendered to appellants warehouse receipts for 100,000 bushels of No. 2 barley on the 12th of January, 1881, but appellants refused to receive the receipts and pay for the barley. Within a reasonable time thereafter appellees sold the barley upon the market, and having credited appellants with the proceeds thereof, they brought this suit, and on the trial in the circuit court they recovered the difference between the contract price and the value of the barley in the market on the day it was to have been delivered by the terms of the contract. Upon the trial appellants denied the making of the alleged contract, that they were partners, or that any purchase of the barley was made for their joint account; and they also contended, if a contract was shown, then that on the next day after it was made they gave notice to appellees that they did not consider themselves bound by the contract, and they would not comply with its terms, and evidence was given tending to sustain this contention. * * *

The questions of law to which our attention has been directed by the arguments of counsel, arise upon the rulings of the circuit judge in giving and refusing instructions. He thus ruled, among other things, that appellants, by giving notice to appellees on the next day after the making of the contract that they would not receive the barley and comply with the terms of the contract, did not create a breach of such contract which appellees were bound to regard, or impose upon them the legal obligation to resell the barley on the market, or make a forward contract for the purchase of other barley of like amount and time of delivery, within a reasonable time thereafter, and credit appellants with the amount of such sale, or give them the benefit

of such forward contract, but that appellees had the legal right, notwithstanding such notice, to wait until the day for the delivery of the barley by the terms of the contract, and then, upon appellants' failure to receive and pay for it on its being tendered, to resell it on the market, and recover from appellants the difference between the contract price of the barley and its market value on the day it was to have been delivered.

That in ordinary cases of contract of sale of personal property for future delivery, and failure to receive and pay for it at the stipulated time, the measure of damages is the difference between the contract price and the market or current value of the property at the time and place of delivery, has been settled by previous decisions of this court (see McNaught v. Dodson, 49 Ill. 446, Larrabee v. Badger, 45 Id. 440, and Saladin v. Mitchell, Id. 79), and is not contested by appellants' counsel. But their contention is, that in case of such contract of sale for future delivery, where, before the time of delivery, the buyer gives the seller notice that he will not receive the property and comply with the terms of the contract, this, whether the seller assents thereto or not, creates a breach of the contract, or, at all events, imposes the legal duty on the seller to thereafter take such steps with reference to the subject of the contract, as, by at once reselling the property on the market on account of the buyer, or making a forward contract for the purchase of other property of like amount and time of delivery, shall most effectually mitigate the damages to be paid by the buyer in consequence of the breach, without imposing loss upon the seller. If the buyer may thus create a breach of the contract without the consent of the seller, we doubt not the duty to sell (where the property is in the possession of the seller at the time), at least within a reasonable time after such breach, will result as a necessary consequence of the breach. When the breach occurs by a failure to accept and pay for property tendered pursuant to the terms of a contract, at the day specified for its delivery, this is doubtless the duty of the seller, and no reason is now perceived why it should not equally result from any breach of the contract upon which the seller is legally bound to act.

But the well settled doctrine of the English courts is, that a buyer cannot thus create a breach of contract upon which the seller is bound to act. [Here the learned justice cites authorities.]

Nothing would seem to be plainer than that while the contract

is still subsisting and unbroken, the parties can only be compelled to do that which its terms require. This contract imposed no duty upon appellees to make other contracts for January delivery, or to sell barley in December, to protect appellants from loss. It did not even contemplate that appellees should have the barley ready for delivery until such time in January as they should elect. If appellees had then the barley on hand, and had acted upon appellants' notice, and accepted and treated the contract as then broken, it would, doubtless, then have been their duty to have resold the barley upon the market, precisely as they did in January, and have given appellants credit for the proceeds of the sale; but it is obviously absurd to assume that it could have been appellees' duty to have sold barley in December to other parties which it was their duty to deliver to appellants, and which appellants had a legal right to accept in January.

We have been referred to Dillon v. Anderson, 43 N. Y. 232, Danforth et al. v. Walker, 37 Vt. 240 (and same case again in 40 Vt. 357), and Collins v. De Laporte, 115 Mass. 159, as recognizing the right of either party to a contract to create a breach of it obligatory upon the other party, by giving notice, in advance of the time for the commencement of the performance of the contract, that he will not comply with its terms. An examination of the cases will disclose that they do not go so far, but that they are entirely in harmony with what we have heretofore indicated is our opinion in respect of the law applicable to the present question.

In Dillon v. Anderson, the action was for a breach of contract for the construction of a pair of boilers for a steamboat. After work had been commenced under the contract, and a certain amount of material had been purchased therefor by the plaintiff, notice was given by the defendant to stop work, that the contract was rescinded by the defendant, and that he would make the plaintiff whole for any loss he might suffer. The court held that it was the duty of the plaintiff, as soon as he received the notice, to have so acted as to save the defendant from further damage, so far as it was in his power.

In Danforth et al v. Walker, 37 & 40 Vt., the defendant made a contract with the plaintiffs to purchase of them five car loads of potatoes, being fifteen hundred bushels, to be delivered at a designated place as soon as the defendant should call for them,

and as soon as he could get them away, some time during the winter. Soon after the first car load was taken, potatoes fell in the market, and the defendant thereupon wrote the plaintiffs not to purchase any more potatoes until they should hear from him. The court held this created a breach of the contract, and that plaintiffs were not authorized to purchase any more potatoes on account of the defendant after they received the notice. The court, in the case in 37 Vt., on page 244, use this language: "While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such increased damages of the other party." And this same rule, upon the authority of these cases, is laid down in 2 Sutherland on Damages, 361.

The points in issue in Collins v. De Laporte are not pertinent to the present question, but in the opinion the court quotes the rule as above laid down, upon the authority of Danforth et al. v. Walker, and other cases.

It will be observed that in each of these cases the time for the performance of the contract had arrived, and its performance had been entered upon. In neither of them was the defendant at liberty, after notifying the plaintiff not to proceed further in the performance of the contract, to demand that he should proceed to perform it, as it was said in Frost v. Knight *supra*, the defendant was, in case of notice, not to perform a contract the time of performance of which is to commence in the future. * * *

It follows that, in our opinion, the ruling on the point in question was free of substantial objection. * * *

Upon the whole, we perceive no error of law in the rulings below. The judgment is therefore affirmed.

Judgment affirmed.

CANDA *v.* WICK.

New York, 1885. 100 N. Y. 127.

This action was brought to recover damages for an alleged breach of contract to receive and pay for 400,000 brick, at a stipulated price of $7.25 per thousand.

The referee found that on Sept. 13, 1881, the plaintiffs agreed to sell the said 400,000 bricks to the defendant and deliver them on the street in front of the premises where a building was being erected by the defendant. On Sept. 21st, the plaintiffs delivered 2,000 brick when defendant prevented further delivery, although plaintiffs offered to perform the contract on their part. The market value of such was at that time $6.75 per thousand. There was no tender of any brick after Sept. 21st. On Oct. 14th, defendant demanded the remainder of the brick, but the plaintiffs refused to deliver. The market value of the brick was then $8.25 per thousand. The referee allowed as damages the difference between the contract price and the market price at the time of refusal to accept delivery.

ANDREWS, J. The referee found, upon sufficient evidence to justify the finding, that the reasons assigned by the defendant on the 21st of September, 1881, for refusing to receive the balance of the brick of the cargo of the schooner Ellen, were groundless. He further found that the brick were of the quality specified in the contract, and that there was a sufficient available space for piling them. Upon the defendant's refusal to permit the plaintiffs' cartmen to continue the delivery, the plaintiffs offered to deliver the balance of the cargo, and stated to the defendant that if brick advanced in price, they could not be held responsible for the delivery on the contract. The defendant persisted in his refusal to receive any more brick from the cargo of the Ellen, assigning the reasons before stated, viz.: defective quality and want of space. The plaintiffs had a right to make delivery on the contract, on the 21st of September. The written memorandum is silent as to the time of delivery, but the evidence shows that prompt delivery and acceptance was contemplated, and that this was one of the considerations upon which the plaintiffs entered into the contract. The tender and refusal constituted, we think, a breach of the contract by the defendant. It was not necessary that the plaintiffs should tender the whole four hundred thousand brick in order to put the defendant in de-

fault. It was not contemplated that the entire number should be delivered in one mass, but as is evident from the situation of the parties and the surroundings, they were to be delivered from time to time, at the convenience of the plaintiffs, but without delaying the defendant in prosecuting the work in which they were to be used. When the defendant refused without adequate reason to accept the cargo of the Ellen, the plaintiffs were at liberty to treat the contract as broken, and were not bound to make an actual tender of the remainder of the brick before bringing the action. This would have been a useless ceremony. The warning given by the plaintiffs to the defendant, that his refusal would absolve them from any obligation on the contract, was not, as is claimed, equivalent to an assertion of a right on their part to regard the contract as still subsisting and executory or as a reservation of a right to deliver the brick if they should so elect. The letter of October 4, 1881, shows that on several occasions after the 21st of September, the plaintiffs were willing to go on with the contract, but the defendant was not ready and only became ready when brick had greatly advanced in price. The right of action having accrued from the transaction of September 21st, it was not waived as matter of law by a subsequent offer on the part of the plaintiffs to furnish the brick, which was not accepted by the defendant until the advance in the market had materially changed the situation. The price which the plaintiffs received for the brick on sale to other parties was immaterial in view of the facts that they were delivered on contracts made prior to September 21st, and that the plaintiffs had the ability to furnish all the brick required for all their contracts, including that with the defendant.

The judgment should be affirmed.

All concur. *Judgment affirmed.*

WINDMULLER *v.* POPE.

New York, 1887. 107 N. Y. 674.

Action for breach of contract to purchase iron.

In January, 1880, plaintiffs agreed to sell and defendants to buy "about twelve hundred tons old iron, . . . , for shipment from Europe at sellers' option, by sail or steam vessels to New York, Philadelphia or Baltimore, at any time from May 1 to

July 15, 1880, at thirty-five dollars per ton, . . . deliverable in vessels at either of the above ports on arrival." On or about June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, and that they must not ship any to them. Plaintiffs thereupon sold said iron abroad which they had purchased to carry out the contract.

(An extract from opinion.) We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendant at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and, by a sale of the iron to other parties, changed their position. (Dillon v. Anderson, 43 N. Y. 231; Howard v. Daly, 61 id. 362; Ferris v. Spooner, 102 id. 12; Hochster v. De La Tour, 2 El. & Bl. 678; Cort v. Ambergate, etc., Railway Co., 17 Ad. & El. 127; Crabtree v. Messermoth, 19 Ia. 179; Benjamin on Sales, §§ 567, 568.)

The ordinary rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract-price and the market value of the property at the time and place of delivery. (Dana v. Fiedler, 12 N. Y. 40; Dustan v. McAndrew, 44 id. 72; Cahen v. Platt, 69 id. 348.)

Per curiam opinion for affirmance.

All concur.

Judgment affirmed.

UNEXCELLED FIRE-WORKS CO. *v.* POLITES.

Pennsylvania, 1890. 130 Pa. 536.

CLARK, J. This is an action of assumpsit, brought July 20, 1888, to recover the price of a certain lot of fire-works and cel-

ebration goods, ordered by the defendant, George Polites, from the Unexcelled Fire-Works Company, of New York, in February, 1888. The first order, which was for his store in New Castle, was given through the plaintiffs' agent, Alexander Morrison, and amounted to $208.53; the second, sent directly to the plaintiffs, was for the defendant's store in Washington, Pa., and amounted to $123.83. These orders were in writing, and were signed by the defendant; they specified, not only the particular kind and quality of the articles ordered, but contained also a schedule of the prices to be paid therefor. The goods were to be shipped in May, and were to be paid for on the 10th day of July thereafter. Upon receipt of these orders the plaintiffs transmitted by letter a formal acceptance of them; a contract was thus created, the obligation of which attached to both parties, and which neither of them, without the agreement or assent of the other, could rescind. On April 5, 1888, the defendant, by letter, informed the plaintiffs that he did not want the goods, and notified the plaintiffs not to ship them, as he could do better with another company. The plaintiffs replied that they had accepted the orders, and had placed them in good faith, and that the goods would be shipped in due time, according to the agreement.

The goods were shipped within the time agreed upon—the first lot to New Castle, and the second lot to Washington, according to contract; but on their arrival the defendant declined to receive them. The carrier notified the shippers that, owing to the dangerous and explosive quality of the goods, they would not retain them in their possession; the plaintiffs thereupon received them back from the carriers, and placed them on storage, subject to the defendant's order.

The plaintiffs allege that they are manufacturers and importers of such fire-works as are used in the Fourth of July celebrations throughout the country; that it is not profitable to carry these goods over from one season to another, and that therefore the quantity manufactured and imported depends upon the extent of the orders received; that the defendant's orders entered into their estimates of goods to be made up and imported for the season of 1888, and that the goods ordered by the defendant were actually made up before the order was countermanded. The defendant testifies, however, that Mr. Morrison, the plaintiffs' agent, informed him, at the time he gave the first order,

that the plaintiffs had some, at least, of the articles in stock, and that he did not order any, either to be manufactured or imported on his account; that the transaction was simply a bargain and sale of goods, and not an order for goods to be manufactured or imported; and the evidence does not seem to conflict with this view of the case.

It is plain that the notice given to the plaintiffs by the defendant not to ship the goods was a repudiation of the contract; it was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant; the direction not to ship was a revocation of the carrier's agency to receive, and the plaintiffs thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant. The plaintiffs made the carrier their agent for delivery, but the goods were in fact not delivered. A delivery was tendered by the carrier, when the goods arrived at their destination, but they were not received. The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered. We think the statement was sufficient to justify a recovery of such damages, as the words of the statement were clearly to this effect; but there was no evidence given of the market value of the goods as compared with the price. It does not appear that the plaintiffs had suffered any damage. For anything that was shown, the goods were worth the price agreed upon in the open market.

Whilst the manifest tendency of the cases in the American courts, now, is to the doctrine that when the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages, in the case of an executory contract for the sale of goods not specific, the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery.

Judgment affirmed.

VAN BROCKLEN *v.* SMEALLIE.

New York, 1893. 140 N. Y. 70.

This action was brought to recover damages for breach of contract for the sale of an interest in a partnership.

FINCH, J. The only question in this case is one of damages. The plaintiff and defendant entered into a written agreement whereby the former agreed to sell and convey, and the latter to purchase and receive, the plaintiff's undivided one-third interest in the partnership of Snyder, Van Brocklen, and Hull, whose assets consisted of real estate held as partnership property for the use of the business, stock on hand, and debts due or to become due; and who were manufacturers of knit goods, occupying their mill for that purpose. The contract was dated February 21st, 1891; the price to be paid was ten thousand dollars; and the formal instruments of sale were to be delivered and the price to be paid on or before the ensuing first of March. The partnership interest of the plaintiff was personal property (Menagh v. Whitwell, 52 N. Y. 146; Morss v. Gleason, 64 id. 204); and the title passed at once upon the execution of the agreement, for it is the general rule that a mere contract for the sale of goods, where the subject is identified and nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the goods sold delivered to the purchaser. (Bradley v. Wheeler, 44 N. Y. 502.) On the morning of February 28th, which was three days after the sale, the defendant announced to his vendor his purpose to "throw up" the contract and to "drop it right there." He made no complaint as to its fairness or justice, no assertion of any deception or mistake, not even of any disappointment in his bargain, but merely said that he had partly promised to put some money into another enterprise and could not put it in both; that his brother was "kicking," and so he should not fulfill his agreement. Ordinarily, the vendee in default proffers some show of justification for his refusal to perform. This defendant had no excuse, but broke his contract because he chose to do so. The vendor, on the same day, served a written notice upon the vendee to the effect that he, the seller, was prepared to carry out the stipulations of the contract; that the papers on his part were executed and ready for delivery, and could be seen at the place where the exchange was to be made, and where they had been

formally tendered to the vendee. As the first of March fell on Sunday, the notice offered performance on the day before or the day after, and insisted upon performance on the latter day at least. The defendant wholly disregarded the notice, and neglected and refused to fulfill his contract. On the second of April following the plaintiff gave a further written notice to the vendee that he had made diligent effort to sell the property since the latter's refusal to take it; that the best offer made was about $2,500 less than the contract price; that he was to give an answer by the next night; and that if he heard nothing to the contrary he should accept the offer and hold the vendee for the resulting loss. The defendant paid no attention to this notice, made no objection, asked no delay, requested no different mode of disposition, suggested no purchaser willing to pay more, but simply remained silent. The plaintiff thereupon sold the one-third interest to his partners, Snyder and Hull, for $7,500, not requiring the cash, but taking $6,000 in notes and the balance in specific articles of property. There is no proof, no pretense, not even a suggestion in the record, that this sale was not perfectly fair and productive of the best price possible to be obtained.

On these facts the plaintiff sued, seeking to recover the deficiency on the re-sale. In answer to inquiries of the defendant, he testified that the interest contracted to be sold was worth $10,000 when the agreement was executed, and when it was to be performed, and such may have been its intrinsic worth, and yet its sale value may have been much less.

At the close of his case the defendant asked the court to rule as matter of law upon the facts, that the measure of damages was the difference between the value of the property at the date of the contract and the date of performance, and that since there was no such difference, the plaintiff was entitled only to nominal damages. The plaintiff objected to any such ruling, insisting that on the facts he was entitled to recover the deficiency on the re-sale. The court ruled that only nominal damages could be recovered, and directed a verdict for six cents, to which the plaintiff excepted. On appeal the General Term affirmed the judgment.

The ground of that affirmance is certainly erroneous. The rule of damages applied was that which pertains to sales of real property, and which differs in scope and in principle from that applicable to sales of personal property. The opinion describes

the contract as one for "the purchase of land," and all the authorities cited relate to sales of real estate. They have no application to the case in hand. The plaintiff had no land to sell and did not contract to sell any. What he did bargain about was his ultimate interest in the partnership assets when converted into money and after payment of all debts. His share of the net surplus then remaining was the only subject of sale, and all that he contracted to sell. His vendee would not and could not become a partner by force of the purchase, would gain no title to the assets as such, and could only force a sale of such assets, including the mill, and the distribution of the proceeds. It was said in Tarbell v. West, 86 N. Y. 287, that "it is now well settled that a purchaser from one partner of his interest in the partnership, acquires no title to any share of the partnership effects, but only his share of the surplus, after an accounting, and the adjustment of the partnership affairs." The courts below, therefore, proceeded on a wrong basis, which led them into error.

In this court the rule of damages for a breach by the buyer of a contract for the sale of personal property, is perfectly well settled. (Dustan v. McAndrew, 44 N. Y. 78; Hayden v. Demets, 53 id. 426.) In each of these cases it was ruled that the vendor of personal property has three remedies against the vendee in default. The seller may store the property for the buyer and sue for the purchase price; or may sell the property as agent for the vendee and recover any deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market price at the time and place of delivery. In the second of the decisions last cited, it was further held that the rule applied, not only to cases where the title passed at once, but also to cases where the contract was executory but there had been a valid tender and refusal. Where the second method is adopted and the vendor chooses to make a re-sale, that need not be at auction, unless such is the customary method of selling the sort of property in question, nor is it absolutely essential that notice of the time and place of sale should be given to the vendee. (Pollen v. LeRoy, 30 N. Y. 556.) Still, as the sale must be fair, and such as is likely to produce most nearly the full and fair value of the article, it is always wisest for the vendor to give notice of his intention to re-sell, and quite unsafe to omit it.

In this case the vendor acted strictly within the authority of our repeated decisions, and must be protected unless we are pre-

pared, after misleading him, to reverse in some degree our own doctrine deliberately declared. What is now said is that we ought not to extend the vendor's right of re-sale to a species of personal property such as is involved in the contract before us. That is an erroneous and misleading statement of the problem. The adjudged rule covers every species of personal property. We have said of it that it is founded in good sense and justice, and that it "is the same in all sales, and in respect to property of every description." (Pollen v. LeRoy, *supra*.) The rule, therefore, needs no extension since it already covers the present case; and the real suggestion is that we should begin for the first time to make exceptions to it, and here and now take out of its scope and operation the one specific sort of personal property which consists of an undivided interest in a partnership. I feel myself bound to resist strenuously, and to advise earnestly against, any such disintegrating exception, whose logical outcome will inevitably be to confuse the rule with narrow and arbitrary distinctions; to open it to attack in numerous directions; to make its operation fickle and uncertain; to breed needless litigation; and in the end to shatter the rule itself. In deference to the doubts of some of my brethren, I ought to state as briefly as possible a few of the reasons why I think no such exception should be made.

One such reason concerns the safety of the fundamental doctrine upon which the rule is founded, which does not admit of such an exception as is now proposed, and will itself be endangered by the resultant logic of the process. That doctrine is that the vendor of personal property has a lien, or something more than a lien, upon it for the purchase price, while it remains in his possession awaiting delivery, although the right of property has passed to the vendee. (Benjamin on Sales, book V., chap. 3, §§ 782, 783; Schouler on Personal Property, vol. 2, § 547.) The right of the unpaid vendor is deemed sometimes analogous to the pawnee's right of sale, and sometimes to the right of stoppage *in transitu*. Whatever it be, it is at least a lien upon the property sold for the purchase price so long as it remains undelivered, which lien the vendor may enforce by a sale, and then recover any balance of the contract price unrealized. Now, are we prepared to say that there is such a lien where the property is grain or hops, or a horse, but is not where it is an interest in a partnership? And upon what principle can we

admit the lien and the consequent right to enforce it in one case and deny it in the other? If we undertake to make the distinction the inevitable result will be to shake or destroy the fundamental doctrine itself with consequences which we may easily see would be likely to prove disastrous.

But, again: Those who would draw the line between kinds or classes of property subject to re-sale, and those not so subject to it, must tell us where it is located, and upon what principle it is to be drawn. That, I suspect, would prove at least a difficult, if not an impossible task. The effort has been many times made, but always hitherto has ended in absolute failure. At first the endeavor was to limit the remedy to the case of perishable property, but in Mac Lean v. Dunn, 4 Bing. 722, that effort was resisted. Best, C. J., said of it: "It is admitted that perishable articles may be re-sold. It is difficult to say what may be considered as perishable articles and what not; but if articles are not perishable, price is, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another." "And," he added, "we are anxious to confirm a rule consistent with convenience and law. . . . The goods may become worse the longer they are kept; and, at all events, there is the risk of the price becoming lower." And so the rule was not confined merely to perishable property.

Another line of distinction is that between goods and merchandise and things in action; but we are not at liberty to draw that line in this state, even if it were possible to do it upon any logical ground. In Porter v. Wormser, 94 N. Y. 442, the contract was for the sale of government bonds, and in denying the right of the vendor to re-sell, Judge Andrews put it upon the ground that the vendee was not in default, adding: "The contract to carry had not expired, and the sale cannot be regarded as the exercise by a vendor of personal property, of a right to re-sell on account of the vendee, and to charge the latter for the loss, for the plain reason that such right in any given case does not come into existence, and can be exercised only after default by the vendee." There was no suggestion that the rule did not apply to things in action, and he cited Dustan v. McAndrew, *supra*, and Mason v. Decker, 72 N. Y. 595.

The latter case shuts off another possible ground of distinction which might be that the rule only applies to such personal property as is the subject of general traffic, and has a market value.

In that case, the thing sold was shares of the stock of a construction company which was badly in want of funds, and struggling, by an issue of bonds to its friends, to procure means to live. This court held that the vendor had a double remedy, and might, as one of them, re-sell the stock after tender to the vendee in default, and recover the resultant loss. So that the rule not only covers things in action, but also those which are not the subject of general dealing, and cannot be said to have a market value.

This last case, in principle, comes very near to the one at bar. The interest of a stockholder in the corporate property represented by his stock is nothing more than a *pro rata* share in the property of the company remaining after the payment of debts and expenses, with the intermediate right to share in the profits. (Burrall v. Bushwick R. R. Co., 75 N. Y. 216.) That is exactly the description of the interest of a partner in a partnership. That one is incorporated and the other not is the sole difference between them without at all affecting the common and identical character of the property owned in each. It seems to me the case must be decisive.

But I draw another inference from it, and that is the wide and dangerous sweep of the doctrine contended for in its application to stock transactions. (I suppose nothing to be more common than sales of stocks by vendors for account of a defaulting vendee and a recovery of the balance unrealized.) Logically that must stop if the exception here contended for be allowed, for I take it that none of us, however astute, can stand upon so thin a distinction in the doctrine under consideration as that between a corporate and non-corporate interest in capital and assets.

I may be permitted to add that I can see no injustice in the application of this rule to the present case. Beyond any question the defendant could have been sued for the whole purchase price, and if solvent could have been made to pay the entire $10,000. If he deemed the re-sale for $7,500 less than could be or ought to be realized, he had the privilege of protecting himself by procuring a more liberal purchaser or taking the property and controlling its sale for himself. He did neither. He kept silent. He defiantly broke his contract and with some natural triumph stands ready to pay the six cents. That is

not enough. He should pay the deficiency resulting from the sale.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except ANDREWS, Ch. J., not voting.

Judgment reversed.

ROEHM *v.* HORST.

Supreme Court of United States, 1900. 178 U. S. 1.

On August 25, 1893, plaintiff agreed to sell and defendant agreed to purchase, under four contracts, 400 bales of hops, to be delivered in installments. Defendant repudiated all liability.

FULLER, C. J. * * * The first contract falls within the rule that a contract may be broken by the renunciation of liability under it in the course of performance and suit may be immediately instituted. But the other three contracts involve the question whether, where the contract is renounced before performance is due, and the renunciation goes to the whole contract, and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. Defendant repudiated all liability for hops of the crop of 1896 and of the crop of 1897, and notified plaintiffs that he should make (according to a letter of his attorney in the record that he had made) arrangements to purchase his stock of other parties, whereupon plaintiffs brought suit. The question is therefore presented, in respect of the three contracts, whether plaintiffs were entitled to sue at once or were obliged to wait until the time came for the first month's delivery under each of them.

It is not disputed that if one party to a contract has destroyed the subject-matter, or disabled himself so as to make performance impossible, his conduct is equivalent to a breach of the contract, although the time for performance has not arrived; and also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly.

And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it

has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. * * *

The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due. If it appear that the party who makes an absolute refusal intends thereby to put an end to the contract so far as performance is concerned, and that the other party must accept this position, why should there not be speedy action and settlement in regard to the rights of the parties? Why should a *locus pœnitentiæ* be awarded to the party whose wrongful action has placed the other at such disadvantage? What reasonable distinction *per se* is there between liability for a refusal to perform future acts to be done under a contract in course of performance and liability for a refusal to perform the whole contract made before the time for commencement of performance? * * *

As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself. If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. Hinckley v. Pittsburgh Co., 121 U. S. 264. Even, if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although he may receive his money

earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain.

In this case the plaintiffs showed at what prices they could have made sub-contracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed.

Judgment affirmed.

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3) CONTRACTS TO MANUFACTURE.

(1) *Breach of Vendor.*

BEEMAN *v.* BANTA.

New York, 1890. 118 N. Y. 538.

PARKER, J. The recovery in this action was for damages claimed to have been sustained because of a breach of an express warranty on the part of the defendant to so construct a freezer for the plaintiffs as that chickens could be kept therein in perfect condition.

The jury have found the making of the warranty, its breach and the amount of damages resulting therefrom. The General Term have affirmed these findings and as there is some evidence to support each proposition, we have but to consider the exceptions taken.

The appellant excepted to the charge of the court respecting the measure of damages. Upon the trial he insisted, and still urges, that the proper measure of damages is the cost of so changing the freezer as to obviate the defect and make it conform to the warranty, and N. Y. S. Moniter Milk Pan Co. v. Remington, 109 N. Y. 143, is cited in support of such contention. That decision was not intended to, nor does it modify, the rule as recognized and enforced in Passinger v. Thorburn, 34 N. Y. 634; White v. Miller, 71 N. Y. 133; Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205; Reed v. McConnell, 101 N. Y. 276, and kindred cases.

In that case the argument of the court demonstrates: First, that improper evidence was received; and second, that the finding of the referee was without evidence to support it. No other proposition was decided. And the discussion is not applicable to the facts before us.

The plaintiff was largely engaged in preparing poultry for market which he had either raised or purchased. Before meeting the defendant he had attempted to keep chickens for the early spring market in a freezer or cooler which he had constructed for the purpose. The attempt was unsuccessful and resulted in a loss. The jury have found in effect that the defendant, with knowledge of this intention of the plaintiff to at once make use of it in the freezing and preservation of chickens for the May market following, expressly represented and warranted that for about $500 he would construct a freezer which should keep them in perfect condition for such market.

That he failed to keep his contract in such respect, resulting in a loss to the plaintiff of many hundred pounds of chickens.

The court charged the jury that if they should find for the plaintiff, he was entitled to recover, as one of the elements of damage, the difference between the value of the refrigerator as constructed, and its value as it would have been if made according to contract. The correctness of this instruction does not admit of questioning. Had the defendant made no use of the freezer, such rule would have embraced all the damages recoverable. But he did make use of it, and such use as was contemplated by the contract of the parties. The result was the total loss of hundreds of pounds of chickens.

The fact that the defendant well knew the use to which the freezer was to be immediately put, his representation and warranty that it would keep chickens in perfect condition, burdens him with the damage sustained because of his failure to make good the warranty.

Upon that question, the court instructed the jury that the plaintiff was entitled to recover the value of the chickens less cost of getting them to market, including freight, and fees of commission merchant.

The question of value was left to the jury, but they were permitted to consider the evidence tending to show that frozen chickens were worth forty cents a pound in the market during the month of May.

Such instruction we consider authorized. The object of the freezer was to preserve chickens for the May market. The expense of construction, and trouble, as well as expense of operation, was incurred and undertaken in order to secure the enhanced prices of the month of May. It was the extra profit

which the plaintiff was contracting to secure, and in so far as the profits contemplated by the parties can be proven, they may be considered. Gains prevented as well as losses sustained are proper elements of damage. (Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205.)

We have carefully examined the other exceptions to the charge as made and to the refusals to charge as requested, and also the exceptions taken to the admissibility of testimony, but find no error justifying a reversal.

The insistence of the appellant that the judgment be reversed because against the weight of evidence, may have been entitled to some consideration by the General Term, but it cannot be regarded here.

The judgment should be affirmed.

All concur, except FOLLETT, CH. J., and VANN, J., not sitting.

Judgment affirmed.

JORDAN *v.* PATTERSON.

Connecticut, 1896. 67 Conn. 473.

ANDREWS, C. J. This action was brought to recover damages for the nonperformance of a contract. The plaintiffs are large dealers in dry goods at wholesale and by retail. The defendants are manufacturers of knit underwear. The complaint alleged generally that on the 16th day of March, 1892, the defendants agreed to manufacture for the plaintiffs a large number of knit undergarments, of various styles and at agreed prices, amounting in the whole to nearly 12,000 dozen, and to deliver the same at various times, but all before the 1st day of December, 1892, for which the plaintiffs were to pay; that the plaintiffs contracted for these goods with the intent, as the defendants knew, to resell the same to other parties; that at the date of said contract they had bargained to sell a part of said garments to other persons at a profit; that afterwards, and before the time when said goods were to be delivered, they bargained to sell the balance of the same to certain other persons at a profit; that the defendants delivered to the plaintiffs, in pursuance of the said agreement, 160 dozen of the said goods, but neglected and refused to deliver the remaining part,—and claimed damages to the amount of $10,000. The defendants' answer denied the making

of the said contract alleged by the plaintiffs, and set up a different one,—a conditional one; and they said, that in performance of the contract so alleged by them, they furnished the said 160 dozen of said garments, but that the plaintiffs neglected to perform the conditions of said last-mentioned contract on their part to be performed, and therefore they (the defendants) did not furnish any more of said goods. The answer also demanded pay for the goods the defendants had so furnished, and damages for the nonperformance by the plaintiffs. * * *

The case was tried on an issue closed to the jury, and the plaintiffs had a verdict for an amount in damages which, they assert, is very much less than they are entitled to have; and they have appealed to this court, alleging various errors in the trial court.

In the light of the undisputed facts in this case, the trial judge should have instructed the jury that the letter of March 16, 1892, was an acceptance of all the orders named in it. And, as there was but one contract claimed to exist between these parties, such instruction would, in effect, have directed them to exclude from their consideration the conditional contract claimed by the defendants.

The general intention of the law giving damages in an action for the breach of a contract like the one here in question is to put the injured party, so far as it can be done by money, in the same position that he would have been in if the contract had been performed. In carrying out this general intention in any given case, it must be remembered that the altered position to be redressed must be one directly resulting from the breach. Any act or omission of the complaining party subsequent to the breach of the contract, and not directly attributable to it, although it is an act or an omission which, except for the breach, would not have taken place, is not a ground for damages. In an action like the present one, to recover damages against the vendor of goods for their nondelivery to the vendee, the general rule is that the plaintiff is entitled to recover in damages the difference at the time and place of delivery between the price he had agreed to pay, and the market price, if greater than the agreed price. Such difference is the normal damage which a vendee suffers in such a case. And, if there are no special circumstances in the case, a plaintiff would, by the recovery of such difference, be put in the same position that he would have been in if the contract had been performed. This, of course,

implies that there is a market for such goods, where the plaintiff could have supplied himself. If there is no such market, then the plaintiff should recover the actual damages which he has suffered. There may be, and often there are, special circumstances, other than the want of a market, surrounding a contract for the sale and purchase of goods, by reason of which, in case of a breach, the loss to a vendee for their nondelivery is increased. In such a case the damages to the vendee which he may recover must, speaking generally, be confined to such as result from those circumstances which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. It must be remembered, also, in attempting to carry out this general intention of the law in any given case, that any damages which the plaintiff by reasonable diligence on his part might have avoided are not to be regarded as the proximate result of the defendant's acts. In the present case the plaintiffs claimed that at the time of delivery there was no market in which they could procure such goods as the defendants were to deliver to them. This was a fact which might be proved by the testimony of any person who had knowledge on the subject. And if it was true the plaintiffs could not, by any diligence on their part, have relieved themselves by such purchase from any portion of the damages which they suffered.

There were various special circumstances by reason of which the plaintiffs claimed to recover damages. One was that they contracted for the said goods for the purpose of reselling them. It is averred in the complaint—and there appears to have been evidence on the trial tending to prove such averments—that at the time the goods were contracted for the plaintiffs had bargained to sell a portion of the said garments to other parties at a profit, and that the defendants had knowledge of the subcontracts. As to the profits on these subsales, the judge charged the jury that the plaintiffs were entitled to recover these as a part of their damages, because, as the judge correctly said, the existence of these subsales was known to the defendants at the time they contracted to furnish the goods, and the profits that were to be made must be considered as having been contemplated by them at that time.

It is also averred in the complaint that, soon after the time the contract was made, the plaintiffs, relying on the same, began to sell the balance of said garments to other parties at a

profit, of which subcontracts they gave notice to the defendants a reasonable time before the date at which the goods were to be delivered. The judge charged the jury that these profits should not be allowed, because, as he said, these sales cannot be considered to have been in the contemplation of the parties at the time they made their contract. As the judge stated it, this ruling was correct. Notice to the defendants after their contract was entered into would not increase their liability. If these subsales could not reasonably be considered to have been in the contemplation of the parties at the time they made the contract, then the defendants could not be made liable for the special profits to be derived therefrom.

But there is an aspect of the question of the profits on these latter subsales—which seems not to have been very clearly presented—upon which the evidence of their terms might have been admissible. The defendants had knowledge that the plaintiffs contracted for these garments in order to resell them to others. They were chargeable with knowledge that the plaintiffs would make such profits as the market price of such goods would give them. If proof of the terms of these last-mentioned subsales was offered for the purpose of showing what the market price of such goods was at the time they were to be delivered, then the evidence should have been received. The market value of any goods may be shown by actual sales in the way of ordinary business.

It was alleged in the complaint that by reason of the default of the defendants the plaintiffs had been obliged to pay large damages to their vendees for their failure to deliver to them the goods so bargained to them, and they offered evidence to prove such a payment to one of their vendees, which evidence was, on objection by the defendants, excluded. In respect to this item of damage, the rule above stated furnished the proper test. In restoring an injured party to the same position he would have been in if the contract had not been broken, it is necessary to take into the account losses suffered, as much as profits prevented. And whenever the loss suffered, or the gain prevented, results directly from a circumstance which may reasonably be considered to have been in the contemplation of the parties when entering into the contract, the plaintiff should be allowed to prove such loss. Whether the circumstance from which the loss results, or the gain is prevented, is or is not one which may be

reasonably considered to have been in the contemplation of the parties, is, from the necessities of the case, an introductory one, upon which the judge must, in the first instance, decide, before evidence either of losses suffered, or gains prevented, can be shown to the jury. When the admissibility of evidence depends upon a collateral fact, the judge must pass upon that fact in the first place, and then, if he admits the evidence, instruct the jury to lay it out of their consideration if they should be of a different opinion as to the preliminary matter. The particular evidence excluded in this case was that of Edward J. Mitton, one of the plaintiffs, to the effect that the plaintiffs had paid to William Taylor & Sons, one of their vendees, the sum of $641 as damages. Both the objection to this evidence, and the ruling upon it, seem to admit that this subcontract was one of which the defendants had notice. The objection to it was that it was not admissible under any allegation in the complaint. But precisely this sort of loss was alleged in the complaint and denied in the answer, and, unless other reasons existed for the exclusion of this testimony than the one claimed, it should have been received. If the sale to Taylor & Sons was one of those sales of which the defendants had notice at the time they made their contract with the plaintiffs, then the evidence was clearly admissible for the reason given by the trial judge when instructing the jury that the profits from these sales should be allowed.

For the purpose of proving the subsales, the plaintiffs offered the deposition of F. R. Chase, one of their traveling salesmen. In the early part of 1892 he was sent out by the plaintiffs to make sales by sample of some of the goods which the defendants were to manufacture. He was asked if he knew by whom these goods were to be manufactured. He said he did, through Mr. Campbell, the plaintiffs' buyer. This question and answer were objected to by the defendants, and ruled out. This objection seems to have been made on a total misapprehension of the object of the evidence. The witness was stating what he was to represent to his customers as to the manufacture of the goods he was trying to sell them. Both question and answer should have been admitted. Whether or not the goods, when they should be delivered, corresponded with the sample and with this statement, would have been quite another question.

One Deland, a buyer for the plaintiffs, testified. He was asked, respecting certain of the goods which the defendants had

contracted to deliver to the plaintiffs. "At what price would these have been retailed?" On objection, he was not permitted to answer. Assuming that Deland had knowledge of the market price at which such goods would have been sold, it is very obvious that his answer would have been relevant, and should have been received.

The other questions made in the case, so far as they are material, would not be likely to arise on another trial. There is error, and a new trial is granted. The other judges concurred.

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(2) *Breach of Vendee.*

BEMENT *v.* SMITH.

New York, 1836. 15 Wend. 493.

This was an action of assumpsit, tried at the Seneca circuit in November, 1834, before the Hon. Daniel Moseley, one of the circuit judges.

In March, 1834, the defendant employed the plaintiff, a carriage maker, to build a sulky for him, to be worth ten dollars more than a sulky made for a Mr. Putnam; for which he promised to pay $80, part in a note against one Joseph Bement, a brother of the plaintiff, for the sum of ten or eleven dollars, and the residue in his own note, at six or twelve months, or in the notes of other persons as good as his own. In June, 1834, the plaintiff took the sulky to the residence of the defendant, and told him that he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant denied having agreed to receive the carriage. Whereupon the plaintiff told him he would leave it with a Mr. De Wolf, residing in the neighborhood; which he accordingly did, and in July, 1834, commenced this suit. It was proved that the value of the sulky was $80, and that it was worth $10 more than Putnam's. The declaration contained three special counts, substantially alike, setting forth the contract, alleging performance on the part of the plaintiff, by a delivery of the sulky, and stating a refusal to perform, on the part of the defendant. The declaration also contained a general count, for work and labor, and goods sold. The judge, after denying a motion for a nonsuit, made on the assumed grounds of variance between the declaration and proof, charged the jury that the tender of the car-

riage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the judge to charge the jury that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, &c. The judge declined so to charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with $83.26 damages. The defendant moved for a new trial. The cause was submitted on written arguments.

By the court, SAVAGE, Ch. J. The defendant presents no defence upon the merits. His defense is entirely technical, and raises two questions: 1. Whether the tender of the sulky was equivalent to a delivery, and sustained the averment in the declaration that the sulky was delivered; and 2. Whether the rule of damages should be the value of the sulky, or the particular damages to be proved, resulting from the breach of the contract. There is no question raised here upon the statute of frauds. The contract is therefore admitted to be a valid one; and relating to something not *in solido* at the time of the contract, there is no question of its validity.

The plaintiff agreed to make and deliver the article in question at a particular time and place, and the defendant agreed to pay for it, on delivery, in a particular manner. The plaintiff made, and, as far as was in his power, delivered the sulky. He offered it to the defendant at the place and within the time agreed upon. It was not the plaintiff's fault that the delivery was not complete, that was the fault of the defendant. There are many cases in which an offer to perform an executory contract is tantamount to a performance. This, I apprehend, is one of them. The case of Towers v. Osborne, 1 Strange, 506, was like this. The question here presented was not raised, but the defendant there sought to screen himself under the statute of frauds. The defendant bespoke a chariot, and when it was made, refused to take it; so far the cases are parallel. In an action for the value, it was objected that the contract was not binding, there being no note in writing, nor earnest, nor delivery. The objection was overruled. In that case the action was brought for the value, not for damages for the breach of contract. This case is like it in that particular; this action is brought for the value, that

is, for the price agreed on; and it is shown that the sulky was of that value. The case of Crookshank v. Burrell, 18 Johns. R. 58, was an action in which the plaintiff declared against the defendant on a contract whereby the plaintiff was to make the woodwork of a wagon, for which the defendant was to pay in lambs. The defendant was to come for the wagon. The question was upon the statute of frauds. Spencer, Ch. J., states what had been held in some of the English cases, Clayton v. Andrews, 4 Burr. 2101, and Cooper v. Elston, 7 T. R. 14, that a distinction existed between a contract to sell goods then in existence, and an agreement for a thing not yet made. The latter is not a contract for the sale and purchase of goods, but a contract for work and labor merely. The case of Crookshank v. Burrell is much like this, with this exception: there the purchaser was to send for the wagon; here the manufacturer was to take it to him. There it was held that the manufacturer was entitled to recover, on proving that he had made the wagon according to the contract: here it is proved that the sulky was made, and taken to the place of delivery according to contract. The merits of the two cases are the same. It seems to be conceded that an averment of a tender of the sulky by the plaintiff, and a refusal of the defendant to receive it, would have been sufficient; and if so, it seems rather technical to turn the plaintiff out of court, when he has proved all that would have been required of him to sustain his action. The plaintiff, in his special counts, does not declare for the sale and delivery, but upon the special contract; and herein this case is distinguishable from several cases cited on the part of the defendant, and shows that it was not necessary to have declared for goods bargained and sold. It seems to me, therefore, that the judge was right in refusing the nonsuit, and in holding that the evidence showed substantially a fulfillment of the contract. The variance as to the amount of Joseph Bement's note, I think, is immaterial; but if otherwise, it may be amended. The alleged variance as to the price of the sulky is not sustained by the facts of the case.

The only remaining question, therefore, is as to damages which the plaintiff was entitled to recover. It is true that the plaintiff does not recover directly as for goods sold; but in the case of Towers v. Osborne the plaintiff recovered the value of the chariot, and in Crookshank v. Burrell the recovery was for the value

of the wagon. The amount of damages which ought to be recovered was not the question before the court in either of those cases; but if the value of the article was not the true measure, we may infer that the point would have been raised. Upon principle, I may ask, what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it: is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another, and sue for the difference between the contract price and the actual sale. Sands and Crump v. Taylor and Lovett, 5 Johns. R. 395, 410, 411; Langfort v. Tiler, 1 Salkeld, 113, 6 Modern, 162. In the first of these cases, the plaintiffs sold the defendants a cargo of wheat. The defendants received part, but refused to receive the remainder. The plaintiffs tendered the remainder, and gave notice that unless it was received and paid for, it would be sold at auction, and the defendants held responsible for any deficiency in the amount of sales. It was held, upon this part of the case, that the subsequent sale of the residue was not a waiver of the contract, the vendor being at liberty to dispose of it bona fide, in consequence of the refusal of the purchaser to accept the wheat. This case shows that where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part. The defendant refused to receive the sulky The plaintiff might, upon notice, have sold the sulky at auction, and if it sold for less than $80, the defendant must have paid the balance. The reason given by Kent, Ch. J., 5 Johns. R. 411, is that it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. But if after tender or notice, whichever may be necessary, the vendor chooses to run that risk and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he

not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.

The question upon the action being prematurely brought before the expiration of the credit which was to have been given, cannot properly arise in this case, as the plaintiff recovers upon the special contract, and not upon a count for goods sold and delivered.

New trial denied.

HOSMER *v.* WILSON.

Michigan, 1859. 7 Mich. 294.

Assumpsit "for work and labour done, and services rendered, and materials furnished, by plaintiff and his servants for defendants, all at request of said defendants." Judgment for plaintiff, and defendants bring error.

It appeared that one of defendants had called at plaintiff's foundry, and there signed a written order for an engine, to be paid for when taken out of the shop, and that plaintiff's clerk accepted the order; that plaintiff then proceeded to make such engine, and only stopped when he received a letter from defendants countermanding the order.

CHRISTIANCY, J. Whether the written memorandum signed by the defendants below, when taken in connection with the whole transaction between the parties, was understood by all of them as a contract, might have been a fair question of fact for the jury. But admitting the contract to have been proved in all respects as claimed by the plaintiff, and that defendants below wrongfully countermanded the order for the engine, after the plaintiff had, in good faith, made most of the castings, and done a large part of the work; the first question which arises is, whether the plaintiff was entitled to recover upon the common counts for work and labor, as upon a *quantum meruit*? As to the materials it is admitted he could not, though contained in the same count; as they still belonged to plaintiff, and were never delivered to defendants.

In the case of a contract for a certain amount of labor, or for work for a specified period—when the labor is to be performed on the materials or property, or in carrying on the business, of the defendant, or when the defendant has otherwise accepted or appropriated the labor performed, if the defendant

prevent the plaintiff from performing the whole, or wrongfully discharge him from his employment, or order him to stop the work, or refuse to pay as he has agreed (when payments become due in the progress of the work), or disable himself from performing, or unqualifiedly refuse to perform his part of the contract, the plaintiff may, without further performance, elect to sue upon the contract and recover damages for the breach, or treat the contract as at an end, and sue in general assumpsit for the work and labor actually performed: Hall v. Rupley, 10 Barr, 231; Moulton v. Trask, 9 Metc., 579; Derby v. Johnson, 21 Vt., 21; Canada v. Canada, 6 Cush., 15; Draper v. Randolph, 4 Harrington, 454; Webster v. Enfield, 5 Gilm., 298.

And in such cases he may, it would seem, under the common *indebitatus* count, recover the contract price, where the case is such that the labor done can be measured or apportioned by the contract rate; or whether it can be so apportioned or not, he may under the *quantum meruit* recover what it is reasonably worth. But in all such cases, the plaintiff, having appropriated and received the benefit of the labor (or, what is equivalent, having induced the plaintiff to expend his labor for him, and, if properly performed according to his desire, the defendant being estopped to deny the benefit), a duty is imposed upon the defendant to pay for the labor thus performed. This duty the law enforces under the fiction of an implied contract, growing out of the reception or appropriation of the plaintiff's labor.

It is therefore evident, 1st, that in all the cases supposed, an implied contract would have arisen, and the plaintiff might have recovered upon a *quantum meruit*, if no special contract had ever been made; 2nd, that in the like cases (where the value of the work done could not, as it probably could not in the case before us, be apportioned by the contract price) the value or fair price of the work done, would necessarily constitute the true measure of damages. And in all such cases, as first supposed, either the contract price, or the reasonable worth of the labor done, would measure the damages.

Similar considerations and like rules would, doubtless, equally apply to contracts for furnishing materials, and for the sale and delivery of personal property, when, after part of the materials or property has been received and appropriated by, or vested in the defendant, he has prevented the plaintiff from performing,

or authorizing him to treat the contract as at an end, on any of the grounds above mentioned.

But the case before us stands upon very different grounds. Here the contract, as claimed to have been proved, was in no just sense a contract for work and labor, nor could the plaintiff, while at work upon the engine, be properly said to be engaged in the business of the defendants. It was substantially a contract for the sale of an engine, to be made and furnished by the plaintiff, to the defendants, from the shop, and, of course, from the materials of the plaintiff. The defendants had no interest in the materials, nor any concern with the amount of the labor. They were to pay a certain price for the engine when completed. Engines, it is true, are not constructed without labor; the labor, therefore, constitutes part of the value of the engine. But this would have been equally true if the contract in this case had been for an engine already completed.

The labor of the plaintiff was upon his own materials, to increase their value, for the purpose of effecting a sale to defendants when completed. No title in any part of the materials was to vest in defendants till the whole should be completed by plaintiff, and delivered to defendants. The plaintiff might have sold any of the materials, after the work was performed, or the whole engine when completed, at any time before delivery to, or acceptance by defendants.

Whether, therefore, the labor actually performed on these materials, when the defendants refused to go on with the contract, or prevented the further performance, had enhanced or diminished the value of the materials, and how much, would be a necessary question of fact, in arriving at any proper measure of damages. The value of the work and labor does not, therefore, in such a case, constitute the proper criterion or measure of damages. If the value of the materials has been enhanced by the labor, the plaintiff, still owning the materials, has already received compensation to the extent of the increased value; and to give him damages to the full value of the labor, would give him more than a compensation. If the value of the materials has been diminished, the value of the labor would not make the compensation adequate to the loss. It would be only in the single case where the materials have neither been increased nor diminished by the labor, that the value of the labor would measure the damages. Such a case could seldom occur,

and whether it could or not, it must always be a question of fact in the case, whether the value of the materials does remain the same, or whether it has been increased, or diminished, and to what extent.

Again, as the defendants never received the engine, nor any of the materials, the title and possession still remained in the plaintiff, and the defendants never having received or appropriated the labor of the plaintiff, if the same work had been performed under the like circumstances, without any actual or special contract, the law would have imposed no duty upon the defendants, and therefore implies no contract on their part to pay for the work done: 1 Chit. Pl., 382; Atkinson v. Bell, 8 B. & C., 277; Allen v. Jarvis, 20 Conn., 38.

The only contract, therefore, upon which the plaintiff can rely to pay him for the labor, is the special contract. No duty is imposed upon the defendants otherwise than by this. This contract, therefore, must form the basis of the plaintiff's action. He must declare upon it, and claim his damages for the breach of it, or for being wrongfully prevented from performing it. His damages will then be the actual damages which he has suffered from the refusal of the defendants to accept the articles, or in consequence of being prevented from its performance; and these damages may be more or less than the value of the labor. This case, therefore, in this respect, comes directly within the principle recognized in the case of Atkinson v. Bell, above cited, and in Allen v. Jarvis, 20 Conn., 38 (a well reasoned case, which we entirely approve). And see Moody v. Brown, 34 Me., 107, where the same principle is recognized.

But it was claimed by plaintiff's counsel that no action could have been maintained on the special contract until fully performed, and the engine delivered or tendered to the defendants; that the unqualified refusal of the defendants to take the engine, when it should be completed, was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We think it was, and that such absolute refusal is to be considered in the same light, as respects the plaintiff's remedy, as an absolute, physical prevention by the defendants. This view will be found fully sustained by the following cases: Cort v. Ambergate Railway Co., 6 E. L. & Eq., 230; Derby v. Johnson, 21 Vt., 21; Clark v. Marsiglia, 1 Denio, 317; Hochster v. De Latour, 20 E. L. & Eq., 157. In the latter

case, it was held that a refusal of the employer before the work commenced, to allow it to be done, authorized an immediate action upon the contract.

So, a refusal to make any payment, which, by the contract, is to be made during the progress of the work, has the same effect: Draper v. Randolph, above cited; and see Hoagland v. Moore, 2 Blackf., 167; Webster v. Enfield, 5 Gilm., 298; Withers v. Reynolds, 2 B. & Ad., 882. See this whole subject ably discussed, and the authorities cited, in 2 Smith's Lead. Cas. (Amer. Edit.), 22 to 38; and for what will amount to prevention, see note of Hare & Wallace to same, 40. As to mode of declaring on the contract: Ibid., 41, and 1 Chit. Pl., 326.

It would be unreasonable and unjust to hold that the plaintiff, in this case, after the positive countermand of the defendants' order, was, nevertheless, bound to go on and complete the engine, and thereby increase the damages, before he could recover for the work already done. The defendants cannot complain that the plaintiff has given credit to their assertion. The law will not require a vain thing. And it is certainly, in such cases, much better for both parties to hold the party thus notified to be fully justified in stopping the work, as it lessens the damages the other party has to pay, and relieves the party who has to do the work from expending further labor, for which he has fair notice he is to expect no payment. And it is certainly very questionable whether the party thus notified has a right to go on after such notice, to increase the amount of his own damages. In Clark v. Marsiglia, above cited, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract, and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in Derby v. Johnson, above cited. This would seem to be good sense, and, therefore, sound law. And it would seem that any other rule must tend to the injury, and, in many cases, to the ruin of all parties.

It is unnecessary here to review the authorities cited by the plaintiff's counsel. Most, if not all of them, when carefully examined, will be found entirely in harmony with the views above expressed. The result of them will be found well and fairly stated, and evidently from a careful examination, in Allen v.

Jarvis, above cited. I have made the same examination, and come to the same result.

It may, however, be proper here to say, that in the case of Planche v. Colburn, 8 Bing., 14, upon which much reliance was placed by the counsel for the defendant in error, there was a special count upon the contract, as well as the common counts, and it may be inferred from the opinion that the plaintiff was allowed to retain his verdict upon the special count. And we have the high authority of Lord Campbell that such was the case. See Hochster v. De Latour, 20 E. L. & Eq. 163, above cited. As the conclusion at which we have arrived upon this point disposes of the whole case, it becomes unnecessary, and even improper to discuss the other questions raised in the case.

And, as we do not conceive that under a writ of error we have any power to amend the declaration in this respect, the judgment must be reversed.

The other Justices concurred.

BALLENTINE *v.* ROBINSON.

Pennsylvania, 1863. 46 Pa. 177.

Assumpsit by William C. Robinson and others, doing business as Robinson, Douglas & Millers, against Nathaniel Ballentine and George Hutchinson, partners trading as Hutchinson & Ballentine. Judgment for plaintiffs, and defendants bring error.

STRONG, J.—The parties entered into a contract by which it was stipulated that the plaintiffs should furnish the materials and construct for the defendants a steam-engine of a described pattern, for which the defendants engaged to pay the sum of $535 on its completion. The engine having been finished pursuant to the contract, and notice of its completion having been given to the defendants, they refused to pay the stipulated price. Hence this suit, in which the only question raised is, what is the correct measure of damages for such a breach of contract. That the plaintiffs had done all they were bound to do, that they had the engine ready for actual delivery, on payment of the sum agreed to be paid by the defendants, and that the defendants were under obligation to take it away and make payment, are established facts. It is now contended that the measure of damages recoverable is the difference between the price contracted to

be paid for the engine and the market price at the time the contract was broken.

Where a sale of goods has been made and they have been delivered, it is plain the measure of damages for nonpayment is the stipulated price. About that there is no difficulty. Doubts, however, have been entertained, where goods have been sold and not delivered in consequence of the refusal of the buyer to complete the contract. It has sometimes been said the standard for measurement is the excess of the contract price over the market value. Yet where the subject of the sale is a specific article, where the contract has been so far completed as to pass the property in the article to the vendee, the possession being retained only because the price is not paid, there seems to be no good reason why the vendor should not be permitted to recover the agreed value. He has fully complied with all that he was under obligation to do. He has parted with his property, and given the full equivalent for the stipulated price. His right to the property having passed to the vendee, his right to the price would appear to be consummate. It is true, if the sale be for cash, the vendor may treat the goods as his own and sell them, on failure of the vendee to pay, in which case he can claim only the difference between the price for which he has sold, and the price promised to be paid by the first vendee. That difference completes his compensation. But the resale is only a mode of giving effect to his lien. It is not a rescission of the contract, so as to revest the property in the article sold in him, for if it were, he could not sue for the deficiency. The law does not compel him to resume the ownership of the property, and, of course, it ought not to take away his right to the price.

The present is not strictly the case of a sale. The plaintiffs agreed to build the engine according to directions of the defendants, and to furnish the necessary materials for it. When it was completed the defendants had notice, and were bound to take it away and pay the contract price; but instead of taking it and paying the price, they requested the plaintiffs to sell it. In such a case the right of property was clearly in them on notice of the completion of the article. The materials of which it was composed may fairly be said to have been delivered when they were put into the engine. The defendants alone were in default. They ought not to be permitted to compel the plaintiffs to purchase from them. Retaining a lien on the engine for the

price, the plaintiffs were at liberty to sell it anew, or, at their election, to obtain full compensation from the defendants for their breach of contract. There can be no just reason why they should be compelled to accept the engine as part payment, which they virtually must do if they can recover only the difference between its market value and the sum the defendants agreed to pay. And why should they, without any default of their own, be subjected to the risk and trouble of a resale, for the defendants' benefit? Besides, it may well be, that the article manufactured according to order may have no market value, and would be worthless on the manufacturers' hands. This engine was not made for sale in the market. It was built according to instructions given by the defendants, and, it may be presumed, for their peculiar use. The just rule, therefore, plainly is, in such a case, where the manufacturer of an article ordered, has completed it, and given notice of its completion, that he should be allowed to sue for the value, and recover, as its measure, the contract price. And such is the doctrine laid down in the better decisions. Thus it was decided in Bement v. Smith, 15 Wendell, 493, where the cases are reviewed, and the rule is thus stated in 2 Parsons on Contracts 483, and in Sedgwick on Damages 281.

The instruction given in the court below was therefore right.

The judgment is affirmed.

SHAWHAN *v.* VAN NEST.

Ohio, 1874. 25 Ohio, 490.

Motion for leave to file a petition in error.

Action by Peter Van Nest against Reasin W. Shawhan to recover on a contract by which he agreed to make for Shawhan a carriage in accordance with his directions for $700, and have the same ready for delivery at his shop October 1, 1871, in consideration whereof Shawhan agreed to accept the carriage at the shop and pay the agreed price. He alleged the tender of the carriage October 1st, and the refusal of Shawhan to accept or pay for it. The evidence established the allegations of the complaint. The court instructed the jury that, if they found the issues for the plaintiff, they should give him a verdict for the contract price of the carriage, with interest from the time the money should have been paid. Shawhan requested the court to give to the jury the following special instructions: (1) "If, in this

case, the evidence shows that the defendant ordered the plaintiff to make for him a carriage, and agreed to take or receive it, when finished, at the plaintiff's shop, and to pay a reasonable price therefor, and the plaintiff did, in pursuance of such order and agreement, make such carriage, of the value of seven hundred dollars, and have the same in readiness for delivery at his shop, of which the defendant had notice, and the defendant then failed, neglected, and refused to take, receive, or pay for said carriage, though requested so to do by the plaintiff, these will not authorize you to render a verdict for the plaintiff for the price or value of the carriage." (2) "If the plaintiff has proved the making of the carriage for the defendant, and the refusal of the latter to receive and pay for it, as alleged in the petition, then he can only recover for the damages or losses he has actually sustained by reason of this refusal of the defendant, which is the difference between the agreed price and the actual value." These instructions the court refused to give, and Shawhan excepted. The jury found for Van Nest, and gave him the contract price of the carriage, with interest.

GILMORE, J. The only question to be determined in this case is: Did the court err in refusing to give to the jury the special instructions requested by the defendant on the trial below? The authorities cited by counsel for the parties respectively, are not in harmony with each other on this question. Some of those cited by the plaintiff in error (defendant below) show clearly that under the pleadings and practice at common law, there could be no recovery under the common counts in assumpsit, for goods sold and delivered, or for goods bargained and sold, where no delivery sufficient to pass the title from the vendor to the vendee had been made. And further, that in this form of action, proof of a tender of the goods by the vendor to the vendee, or leaving them with him against his remonstrance, would not constitute such a delivery as would pass the title and enable the vendor to recover. While these may be regarded as settling the rules of pleading and evidence on the trial of particular cases, and therefore not decisive of the question when raised under issues so formed as to present it freed from the technicalities of pleading, still there are other cases cited on the same side, which declare the rule to be as follows: Where an action is brought by the vendor against the vendee, for refusing to receive and pay for goods purchased, the measure of damages is the actual loss sus-

tained by the vendor in consequence of the vendee refusing to take and pay for the goods, or, in other words, the difference between the contract price and the market price at the time and place of delivery. In the authorities cited by the plaintiff in error, no distinction is drawn, or attempted to be drawn, between the sale of goods and chattels already in existence, and an agreement to furnish materials and manufacture a specific article in a particular way, and according to order, which is not yet in existence; the theory being, that in neither case would the title pass, or property vest in the purchaser, until there had been an actual delivery, and that until the title had passed, the vendor's remedy was limited to the damages he had suffered by reason of the breach of the contract by the vendee, which were to be measured by the rule above stated. In this case it is not necessary to determine whether or not a distinction, resting upon principles of law, can be drawn between ordinary sales of goods in existence and on the market, and goods made to order in a particular way, in pursuance of a contract between the vendor and vendee. The case here is of the latter kind, and the question is, whether the plaintiff below was entitled to recover the contract price of the carriage, on proving that he had furnished the materials, and made and tendered it in pursuance of the terms of the contract.

Counsel for the defendant in error (plaintiff below) has cited a number of authorities, in which the questions presented and decided arose upon facts similar to those in this case, and upon issues presenting the question in the same way; and as the conclusions we have arrived at, are based upon this class of authorities, some of them may be particularly noticed.

In Bement v. Smith, 15 Wend. 493, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, for which he promised to pay eighty dollars. The plaintiff made the sulky according to contract, and took it to the residence of the defendant, and told him he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant refused to receive it. Whereupon the plaintiff told him he would leave it with Mr. De Wolf, who lived near; which he did, and commenced suit. On the trial it was proved the sulky was worth eighty dollars, the contract price. The court charged the jury, that the tender of the carriage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between

the parties. The defendant's counsel requested the court to charge the jury that the measure of damages was not the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, etc. The judge declined to so charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with eighty-three dollars and twenty-six cents damages, being the contract price with interest. The charge to the jury was sustained by the supreme court of New York.

In Ballentine et al. v. Robinson et al., 46 Penn. St. 177, an agreement was made between the plaintiffs and defendants, whereby the plaintiffs were to provide materials, and construct for the defendants a six-inch steam-engine, with boiler and Gifford injector and heater, in consideration whereof the defendants were to pay plaintiffs five hundred and thirty-five dollars in cash on the completion thereof. The plaintiffs complied with and completed the contract in all respects on their part, but the defendants refused to pay according to contract. On the trial, the plaintiffs proved the contract, and the performance of it on their part, and that the engine was still in their hands.

The defendants' counsel asked the court to instruct the jury "that the proper measure of damages in this case is the difference between the price contracted to be paid for the engine and the market price at the time the contract was broken." The court declined to charge as requested, and instructed the jury that the measure of damages was the contract price of the engine, with interest. There was a verdict for the plaintiffs for the contract price. The case was taken to the supreme court, and the error assigned was the refusal of the court to give the instructions requested by the defendant.

The supreme court affirmed the judgment in the case below. It will be seen that these cases are very similar, and presented the same question, and in the same manner that the question is presented in this case. Graham v. Jackson, 14 East, 498, decides the point in the same way. Mr. Sedgwick, in his work on Damages, side page 280, in speaking on this subject, says: "Where a vendee is sued for nonperformance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement; but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or

only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases that the vendor can resell them, if he sees fit, and charge the vendee with the difference between the contract price and that realized at the sale. Though perhaps more prudent it is not necessary that the sale should be at auction; it is only requisite to show that the property was sold for a fair price. But if the vendor does not pursue this course, and, without reselling the goods, sues the vendee for his breach of contract, the question arises which we have already stated, whether the vendor can recover the contract price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be that the vendor can recover the contract price in full."

In Hadly v. Gano et al., Wright, 554, the action was "assumpsit on a written agreement between the parties, for the defendants to take all the salt the plaintiff manufactured between the 2d of June, 1831, and the 1st of January, 1832, to be delivered at the landing in Cincinnati, from time to time, as the navigation of the Muskingum and Ohio should permit, and to pay forty-five cents a bushel." The plaintiff proved the agreement, and the offer to deliver to the defendants three hundred and fifty barrels of salt, which the defendants refused to receive. There was an issue in the case, as to whether the contract had been previously fulfilled and abandoned by the parties. The court (Lane, J.) charged the jury that if the contract had not been "fulfilled or abandoned, and the plaintiff tendered the salt under the contract, which was refused, he had a right to leave it for the defendants and recover the value."

The only case I have examined in which the authorities on this point are reviewed, is that of Gordon v. Norris, 49 N. H. 376. The case is too lengthy and complicated to attempt to give an abstract of it here, but the point under consideration was involved; and although the learned judge criticises the law as laid down by Mr. Sedgwick, and even shows that the authorities he quotes in support of his position do not sustain him, for the reason pointed out, yet he says that there is a distinction between the case of Bement v. Smith, and the ordinary cases of goods sold and delivered—viz., "the distinction between a contract to sell goods then in existence, and an agreement to furnish materials and manufacture an article in a particular way and according to

order, which is not yet in existence." He recognizes Bement's Case and others of the same class as exceptions to the general rule which is to be applied in the sale of ordinary goods and merchandise which have a fixed market value; and in the syllabus of the case, the distinction is kept up and stated as follows:

"When the vendee refuses to receive and pay for ordinary goods, wares, and merchandise, which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract price for the goods, but the difference between the contract price and the market price or value of the same goods at the time when the contract was broken.

"But when an artist prepares a statue or picture of a particular person to order, or a mechanic makes a specific article in his line to order, and after a particular measure, pattern, or style, or for a particular use or purpose—when he has fully performed his part of the contract, and tendered or offered to deliver the article thus manufactured according to contract, and the vendee refuses to receive and pay for the same, he may recover as damages, in an action against the vendee for breach of the contract, the full contract price of the manufactured article."

As has been said, we are not called upon now to determine whether the distinction as drawn in the clauses quoted, is sound on principle or not; but be that as it may, we recognize the law applicable to the case before us as being correctly stated in the clause last quoted.

Judge Swan, in his excellent "Treatise," (10th ed. 780), in speaking of the effects of a tender upon the rights of the buyer and seller, and of the damages in such case, says: "The general rule in relation to the rights of a seller, under a contract of sale, where he has tendered the property, and the buyer refuses to receive it, is this: The seller may leave the property at some secure place, at or near the place where the tender ought to be and is made, and recover the contract price; or he may keep it at the buyer's risk, using reasonable diligence to preserve it, and recover the contract price and expenses of preserving and keeping it; or he may sell it, and recover from the buyer the difference between the contract price and the price at which it fairly sold." The rule as thus laid down was first published in 1836, two years after the decision in Hadly's Case, above referred to, which was substantially followed by Judge Swan in

laying it down. It does not appear that either the decision or the rule as laid down has ever been questioned in Ohio. It will be perceived that Judge Swan lays down the rule generally as applicable to all sales of chattels in the ordinary course of trade, without intimating any such distinction as that drawn in Gordon v. Norris. We sanction and apply the rule in the determination of the particular case before us. When the plaintiff below had completed and tendered the carriage in strict performance of the contract on his part, if the defendant below had accepted it, as he agreed to do, there is no question but that he would have been liable to pay the full contract price for it, and he can not be permitted to place the plaintiff in a worse condition by breaking than by performing the contract according to its terms on his part. When the plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it at the defendant's risk, using reasonable diligence to preserve it, and recover the contract price, with interest, as damages for the breach of the contract by the defendant. Or, at his election, he could have sold the carriage for what it would have brought at a fair sale, and have recovered from the defendant the difference between the contract price and what it sold for.

The court below did not err in refusing to give to the jury the special instructions requested by the defendant below.

Motion overruled.

McIlvaine, C. J., and Welch, White, and Rex, JJ., concurred.

TODD *v.* GAMBLE.

New York, 1896. 148 N. Y. 382.

Gray, J. This appeal presents the question of the proper measure of damages in an action against the defendants for refusing to perform their contract with the plaintiffs. By that contract the plaintiffs, who were manufacturers of chemicals, were to furnish the defendants with "whatever quantities of silicate of soda they will require to use in their factories during one year from date" at the price of $1.10 per 100 pounds, in New York. Under this agreement the plaintiffs had delivered, and the defendants had paid for, 350 barrels of the article, when the latter notified the former that they would not receive any

more. The refusal on the part of the defendants to perform their contract seems to have been purely arbitrary. * * *

It was conceded that for the balance of the contract year the defendants used about 2,877 barrels of silicate of soda (each barrel containing about 550 pounds), which they purchased from other parties; and under instructions from the court that the plaintiffs, if there was no market value for the article, were entitled to recover the difference between the cost of production and the contract price,-the jury rendered a verdict for the plaintiffs, against the defendants for their failure to take that amount, for damages measured by that rule. They also, upon the request of the court, made a special finding that at the time of the breach by the defendants of their contract there was no market value for silicate of soda.

The general rule for the measure of damages in the case of a breach by a vendee in the contract for the sale of an article of merchandise at a fixed price is the difference between the contract price and the market value of the article on the day and at the place of delivery. (Citing authorities.) That is the rule which has been recognized both in England and here. The principle upon which it rests is that of an indemnification of the injured party for the injury which he has sustained, and, in ordinary cases, the value in the market on the day forms the readiest and most direct method of ascertaining the measure of this indemnity. If the article is bought and sold in the market, the market price shows what pecuniary sum it would take to put the plaintiff in as good a position as if the contract had been performed. * * *

To justify a departure from this general rule, the facts must take the case out of the ordinary, and, if there is no such standard as a market value, the measure of the plaintiff's damage may be arrived at, in a case like the present one, by ascertaining the difference between the contract price and the cost of production and delivery. Market value, in the ordinary sense, is generally, but not always, the measure of damages, and the application of the rule necessarily must be to a case where it is shown that there is a market value for the subject of the contract of sale.

The defendants proceed upon the assumption that if an article is shown to have a value, or selling price, the measure of damages must be the difference between it and the contract price, in-

respective of the question of the nature of the market for it. To use their language: "If there be no market, in a restricted sense, yet, if the commodity is the subject of sale, and there is a selling price, the same rule obtains, and proof of cost should be excluded." Proceeding upon that assumption, they argue, substantially, that as there was shown to be a selling price, from the fact of there having been sales of the article by the plaintiffs, it is a controlling factor, and compels the application of the general rule for which they contend. To that proposition I think we should not assent, and I fail to find adequate support for it either in principle or in the authorities.

The general rule certainly can have no application to the case of a breach of a contract for the manufacture and sale of a commodity, unless it is made to appear that upon the breach by the vendee the vendor could have placed the commodity upon the market, and, by thus disposing of it, have relieved himself from the consequences of the defendants' default. The principle of indemnity upon which the rule rests would be satisfied in such a case, and the vendor would be confined for his recovery to the difference between a known market value at the time of the breach of the contract and the price fixed by the contract.

* * *

What must the parties be deemed to have contemplated in the present case? The defendants bound the plaintiffs, through this contract, to supply all the silicate of soda which they would require for the year. The plaintiffs, with ample capacity for supplying the article, contemplated that their production would be increased by the amount which the defendants would take from them during the year. * * *

Of course, they must have contemplated a profit to the plaintiffs if they could manufacture at a cost under the contract price. It is absurd to say, in view of the evidence, that there was a market value, in the ordinary sense of the term, for silicate of soda, and, perhaps, the defendants do not seriously argue that there was. But if we are to hold, in accordance with their views, because there was a price at which the plaintiffs had been able to effect sales of the article at the time of the breach, that that fact must be controlling in fixing the measure of damages, we should be doing a great injustice, and we should be establishing a commercial rule, which would work injuriously in cases where, like the present one, the subject of sale between the par-

ties is an article perishable in its nature, when kept for any length of time, having but a limited demand, and no real market, and only manufactured in any quantities upon orders by consumers.

I think we should conclude that there was no error in the instruction given by the trial judge to the jury and this conclusion makes it unnecessary for us to consider any of the other exceptions in the case.

The judgment appealed from should be affirmed with cost.

All concur.

Judgment affirmed.

GUETZKOW BROS. CO. *v.* ANDREWS.

Wisconsin, 1896. 92 Wis. 214.

This action was brought to recover $1,978, the price of showcases and of articles manufactured for the defendants by the plaintiffs. The goods were manufactured for a special purpose, namely, to enable defendant to carry out a contract previously made to supply such goods to exhibitors at the World's Fair. The amounts that defendant was to receive from such exhibitors were an advance over plaintiff's price of 100 to 150 per cent. The defendants sought to counterclaim as to damages which they asserted they had sustained by reason of the failure of plaintiff to construct the article in accordance with the contract, whereby defendant lost certain profits. * * *

MARSHALL, J. * * * There is no controversy but that the difference between the contract price for the goods to appellant and what it was to receive was unusually large. To say that such increased price to the exhibitors was extraordinary, in a superlative degree, would be fully justified. It also appears beyond controversy that respondent's officers knew, when the contract was made with appellants, that the goods were intended for a special purpose. They had reason to know that there was no established market price for such goods. They knew that defendants were under contract to furnish the goods to the exhibitors, but it does not appear that they had any notice of the contract price such exhibitors were to pay; and it is in the light of these facts that we must determine the question presented. [Citing authorities.] * * *

Where there has been a previous sale, or where there has not,

the fundamental principle to be observed is that the damages for the breach complained of must be confined to such as may be fairly considered to arise, according to the usual course of things, from such breach, or such as may reasonably be supposed to have been in contemplation of the parties at the time of making the contract as the probable result of the breach of it. Hadley v. Baxendale, 9 Exch. 341; Cockburn v. Lumber Co., 54 Wis. 619. Hence, it is held that, in order to make applicable the special rule of damages,—that is, loss of profits,—it must be shown that the special circumstances, by reason of which the party invokes such application, were brought clearly home to the knowledge of both parties at the time the contract was made, and it is only applicable in so far as such circumstances were so brought home. [Citing authorities.] * * *

But the question arises whether the price to the first vendee must be communicated to the second vendor in order that he may be charged with the special rule of damages at the suit of his vendee, in case of a breach on the part of such second vendor; and upon the precise point here presented the authorities are not numerous. In Cockburn v. Lumber Co., 54 Wis. 619, Mr. Justice Lyon said: "To bind the defendant by a price stipulated for on a resale, he must have had notice of such resale when the contract was made, though, perhaps, not of the contract price." But it must be observed that, in the case then under consideration, the circumstance of extraordinary profits was not present; that is, the evidence did not disclose but that the profits were such as were reasonable, and might reasonably have been in contemplation by both parties to the transaction when the contract was made.

The question has been many times considered in the courts of England, and may be said to have been long settled, that the second vendor is only bound by the terms of the contract with the second vendee, so far as communicated to him, or he had reasonable ground to know the same, by inference from facts brought to his knowledge. All of the cases refer to and are founded upon the general principle laid down in Hadley v. Baxendale, 9 Exch. 341. * * *

Differences may be found in the interpretations which courts have put on the rule of Hadley v. Baxendale; but they generally hold that the price in the first contract need not be communicated, as intimated in Cockburn v. Lumber Co., in this

court. They proceed upon the principle, all of them, that knowledge of the first contract is sufficient to bring home to the second vendor, as an inference of fact, knowledge that the price in the first contract is sufficiently in advance of the price in the second contract to allow a reasonable profit to the second vendee. We venture to say that no case can be found, where the price was out of all proportion to anything that might be considered reasonable in order to give a fair profit, that the court has held that such unreasonable profits may be recovered as damages, where knowledge of such unreasonable profits, as a special circumstance, was not known to both parties at the time of the making of the contract. The most that is held in Booth v. Mill Co., 60 N. Y. 487, cited with confidence by appellants, is that the second vendor is bound by the price his vendee is to receive, unless it is shown that such price is extravagant, or of an unusual or exceptional character. That is as far as the New York courts have gone. Church, C. J., said: "There is considerable reason for the position that, where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a previous contract, and he knows there is no market price for the article, he assumes the risk of being bound by the price named in such previous contract, whatever it may be." But no such rule was adopted, and no case was there cited to support such a rule, and we are unable to see wherein such reason exists. It could only be consistent with the theory that the law aims at complete compensation for all losses, including gains prevented as well as losses sustained, without the important condition, requisite to give the rule the basic foundation upon which all rules for the assessment of damages are supposed to rest, that of natural justice, which condition must always be considered in order that the true rule may be correctly stated. That is, that the damages must be such as can be fairly supposed to have entered into the contemplation of both parties. * * *

It follows from the foregoing that there was no evidence before the referee by which he could have assessed in plaintiff's favor damages for loss of profits for the breach of the contract between it and the defendant, if there was a breach. * * *

It follows from the foregoing, that the judgment of the superior court should be affirmed.

BY THE COURT. The judgment of the superior court is affirmed.

For rule of damages in an action against a common carrier for unlawful discrimination in the shipping of freight, see Railway Co. v. Wren, 17 Ohio, 137.

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3. *Contracts Relating to Work, Labor and Services.*

HAYWARD *v.* LEONARD.

Massachusetts, 1828. 7 Pick. 181.

This was an action of assumpsit. It appeared that the plaintiff erected a house upon the defendant's land within the time and of the dimensions stated in the contract, but that in workmanship and in materials it was not according to the terms of the agreement. During the progress of the work the defendant visited the place and directed some variations from the contract.

PARKER, C. J. The point in controversy seems to be this: whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labour done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favour of the action, and that upon the whole it is conformable to justice, that the party who has the possession and enjoyment of the materials and labour of another, shall be held to pay for them, so as in all events he shall lose nothing by the breach of contract. If the materials are of a nature to be removed and liberty is granted to remove them, and notice to that effect is given, it may be otherwise. But take the case of a house or other building fixed to the soil, not built strictly according to contract, but still valuable and capable of being advantageously used, or profitably rented—there having been no prohibition to proceed in the work after a deviation from the contract has taken place—no absolute rejection of the building, with notice to remove it, from the ground; it would be a hard case indeed if the builder could recover nothing.

And yet he certainly ought not to gain by his fault in violating

his contract, as he may, if he can recover the actual value; for he may have contracted to build at an under price, or the value of such property may have risen since the contract was entered into. The owner is entitled to the benefit of the contract, and therefore he should be held to pay in damages only so much as will make the price good, deducting the loss or damage occasioned by the variation from the contract. [Here the learned justice cites authorities.]

It is laid down as a general proposition in Buller's Nisi Prius, 139, that if a man declare upon a special contract and upon a *quantum meruit*, and prove the work done but not according to the contract, he may recover on the *quantum meruit*, for otherwise he would not be able to recover at all. Mr. Dane (volume 1, p. 223) disputes this doctrine, and thinks it cannot be law unless the imperfect work be accepted. Buller makes no such qualifications. * * *

Mr. Dane's reasoning is very strong in the place above cited, and subsequently in volume 2, p. 45, to show that the position of Buller, in an unlimited sense, cannot be law; and some of the cases he puts are decisive in themselves. As if a man who had contracted to build a brick house, had built a wooden one, or instead of a house, the subject of the contract, had built a barn. In these cases, if such should ever happen, the plaintiff could recover nothing without showing an assent or acceptance, express or implied, by the party with whom he contracted. Indeed such gross violations of contract could not happen without fraud, or such gross folly as would be equal to fraud in its consequences. When we speak of the law allowing the party to recover on a *quantum meruit* or *quantum valebant*, where there is a special contract, we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars provided for. Cases of fraud or gross negligence may be exceptions.

In looking at the evidence reported in this case, we see strong grounds for an inference that the defendant waived all exceptions to the manner in which the work was done. He seems to have known of the deviations from the contract—directed some of them himself—suffered the plaintiff to go on with his work—made no objection when it was finished, nor until he was called on to pay. But the case was not put to the jury on the ground

of acceptance or waiver, but merely on the question, whether the house was built pursuant to the contract or not; and if not, the jury was directed to consider what the house was worth to the defendant, and to give that sum in damages. We think this is not the right rule of damages; for the house might have been worth the whole stipulated price, notwithstanding the departures from the contract. They should have been instructed to deduct so much from the contract price, as the house was worth less on account of these departures. And upon this ground only a new trial is granted.

VALENTE *v.* WEINBERG.

Connecticut, 1907. 80 Conn. 134.

Action for services rendered and materials furnished under building contracts. From a judgment for plaintiff, defendant appeals.

THAYER, J. The plaintiff and defendant entered into two contracts for the erection of a brick apartment house by the former upon the land of the latter. The second contract provided merely for additions to and changes in the earlier one, and we may refer to them as one contract. The plaintiff claims that after he had nearly completed the building the defendant unlawfully ejected him from the premises and prevented his completion of the contract. He sues to recover the value of the labor and materials which he had furnished before he was ejected. The defendant admits that he ejected the plaintiff and terminated his employment under the contract, but claims to have done so pursuant to article 5 of the contract, and by his answer and counterclaim seeks to recover from the plaintiff the amount which the defendant has paid to another person to complete the building. If the plaintiff, without fault on his part, was prevented by the defendant from completing the contract, he could treat it as rescinded, and recover, on *quantum meruit*, for the work and labor performed under it, or he could bring his action for damages against the defendant for breaking the contract and preventing the plaintiff's performance of it. Derby v. Johnson, 21 Vt. 18, 21; Wright v. Haskell, 45 Me. 492; United States v. Behan, 110 U. S. 338, 344, 4 Sup. Ct. 81, 28 L. Ed. 168; Chicago v. Tilley, 103 U. S. 146, 154, 26 L. Ed. 371; Connelly v. Devoe, 37 Conn. 570, 576. If, on the other hand, the plaintiff failed

to perform his contract, and the defendant rightfully entered and completed it, acting under the terms of the contract, the plaintiff cannot recover. The case turns, therefore, upon the question whether the defendant rightfully entered and ejected the plaintiff. * * *

We think, as already indicated, that such a certificate in strict compliance with the terms of article 5 was essential, and that the defendant, in proceeding to eject the plaintiff and prevent his performance of his contract without such certificate, acted wrongfully. The plaintiff, therefore, is entitled to recover for the services and materials furnished in the construction of the building.

The court correctly overruled the defendant's claim that, if the plaintiff was entitled to recover, "the measure of damages is that adopted in Pinches v. Church, 55 Conn. 183, 10 Atl. 264, viz.: the total which the plaintiff could have recovered, less what it cost to complete the building," deducting any payments which had been received by him. The case referred to and the present case are within well-recognized, but different, exceptions to the general rule that no recovery can be had for labor or materials furnished under a special contract unless the contract has been performed. The present case is within the exception which permits a recovery by the contractor when the other party has incapacitated himself to perform his part of the contract, or prevented the contractor from performing his. The failure to perform being due to the defendant, and without fault on the plaintiff's part, it would be unjust that he should suffer because of the defendant's fault while the latter reaps the full benefit of the contract. The case of Pinches v. Church was within the exception which allows a recovery when the contractor has deviated slightly from the terms of the contract, not willfully, but in good faith, and the other party has availed himself of and been benefited by the labor and materials furnished. In such a case it is manifestly just that the latter should be allowed for any reasonable expense incurred in remedying the defect, or in making additions necessary to complete the work. In Pinches v. Church, it being impracticable, at a reasonable price, to complete the work according to the contract, the plaintiff was allowed the contract price less the diminution in value of the building by reason of the deviations. The difference between that case and this is clear, and the reason for a different rule of damages is

equally clear. Had the plaintiff in the present case, instead of treating the contract as rescinded, sought to recover damages for the defendant's breach of it, a different rule of damages, but not that contended for by the defendant, would have applied. United States v. Behan, *supra;* Derby v. Johnson, *supra.* But the allegations of the complaint are not adapted to such a cause of action, and it must be treated as an action to recover for services rendered and materials furnished.

The defendant alleges error on the part of the trial court in holding that he was not entitled to recover the items referred to in paragraph 13 of the finding. But all these items were in effect allowed him in the judgment, except the loan of $462, which was not recoverable under the pleadings.

The remaining reasons of appeal need not be discussed, because their soundness depends upon the validity of the defendant's claims (already considered and decided adversely to his contention) that the action is upon the contract, and that the architects were *quasi* judges between the parties, and had given a certificate which warranted the defendant in terminating the plaintiff's employment.

WARE BROS. CO. *v.* CORTLAND C. & C. CO.

New York, 1908. 192 N. Y. 439.

HAIGHT, J. On the 14th day of March, 1903, the defendant, Cortland Cart & Carriage Company, entered into a written contract with the plaintiff, Ware Bros. Company, by which the defendant agreed to pay the plaintiff the sum of $350 for publishing its advertisement once a month for 12 months in a monthly publication, issued by the plaintiff, known as the "Vehicle Dealer." Thereafter, and on the 2d day of April, 1903, and after it is claimed the plaintiff had prepared the defendant's advertisement for printing in its Vehicle Dealer, the defendant wrote the plaintiff asking it to cancel the contract. This the plaintiff refused to do, and thereupon it published the advertisement for the period designated in the contract, and then, upon the refusal of the defendant to pay therefor, brought this action to recover the amount of the contract price. Upon the trial the plaintiff proved the contract and its performance thereunder, and rested. Then the defendant produced evidence to the effect that it had directed the contract to be canceled and not

performed by the plaintiff, and then rested. The court dismissed the plaintiff's complaint upon the ground that the contract price was not the measure of damages which the plaintiff was entitled to recover, and, inasmuch as there was no evidence showing the amount of damages that had been sustained by the plaintiff by reason of the revocation of the contract by the defendant, there could be no recovery.

It will be observed that the contract ran for one year, and that no payment was due until the contract had been fully performed by the plaintiff. It required the printing of the defendant's advertisement in the plaintiff's publication monthly for that period of time, and its circulation among the subscribers for the plaintiff's Vehicle Dealer. The contract in some respects differs from that of the ordinary employment of servants for specified terms; but we see no reason why the rule pertaining to such contracts should not apply and control in the disposition of this contract. Clark v. Marsiglia, 1 Denio, 317; Lord v. Thomas, 64 N. Y. 107-109; Railway Advertising Co. v. Standard R. C. Co., 83 App. Div. 191, affirmed 178 N. Y. 570. In the case of Howard v. Daly, 61 N. Y. 362, it was held that where a contract for future employment had been entered into, and afterwards revoked by the employer, the remedy of the employé is an action to recover damages as for a breach of the contract. In such an action the damages are *prima facie* the amount of the wages for the full term, and the burden of proof is upon the defendant to show the mitigation in damages. While this rule may have received some criticism in other jurisdictions, it has steadily been adhered to in the Supreme Court, and has recently been reasserted in this court in the case of Milage v. Woodward, 186 N. Y. 252-257. See, also, Allen v. Glen Creamery Co., 101 App. Div. 306, and authorities cited.

Applying this rule to the case under consideration, it is apparent that the court erred in its conclusion of law to the effect that there was no evidence showing that there were damages occasioned by the revocation of the contract by the defendant; for the contract price would *prima facie* be the measure of damages, unless the defendant should show the amount that should be deducted therefrom by reason of its revocation of the contract. In reaching the result above indicated, we wish it understood that it is not our purpose to extend the rule beyond the facts found in this case. Nor is it our purpose to limit or

impair the rule that, in a breach of an ordinary contract for the manufacture of an article of the supplying of goods or merchandise, including that which is known as ordinary job printing, the damage is the difference between the contract price and the cost of the goods, merchandise, or manufactured article, in which the burden of showing the damages rests on the plaintiff. The distinguishing feature in this case, as we regard it, is that the publishing of an advertisement in a periodical is the same as the publishing in a daily or weekly newspaper, which involves the investment of no additional capital, or the use of any material other than the ink used and the paper upon which it is printed, and these articles are of such trivial value as not in our judgment to change the character of the contract from one for services to be rendered.

The judgment should therefore be reversed.

In Pittsburgh Sheet Co. v. West Penn. Sheet Steel Co. 201 Pa. 150. defendant had contracted to deliver sheet steel to plaintiff, who was a manufacturer. Defendant broke this contract, and plaintiff sought to recover the difference between the contract price and the cost of the material and the expense of manufacture. This was allowed. But a claim for manufacturer's profits was rejected by the court.

"If the buyer purchases goods in place of those contracted for at less than the market value, and thus reduces the loss, he can recover only the actual loss." Arnold v. Blabon, 147 Pa. 372.

"A person can only be held to be responsible for such consequences as may be reasonably supposed to be in contemplation of the parties at the time of making the contract." Mr. Justice HOLMES, in Globe Refining Co. v. Cotton Oil Co. 190 U. S. 540.

The motive for the breach of a contract is commonly immaterial in an action on the contract. *Ib.*

"The purchaser, in the event of breach of warranty, has the election of two remedies, viz.: First, to return the article purchased, recover back the purchase price paid, and certain special damages; or he may retain the machine, and recover or recoup against the agreed purchase price such damages as its defective condition imposes upon him without negligence on his part." Optenburg v. Skelton, 109 Wis. 244.

"When the vendor stands in the position of a complete performance on his part, he is entitled to recover the contract price as his measure of damages." Puritan Coke Co. v. Clark, 204 Pa. 556.

In an action on a contract to manufacture where there has been a breach, the plaintiff "must not by inattention, want of care, or inexcusable negligence, permit his damages to grow and then charge it all to the other party." Noble v. American Three Color Co. 37 Misc. 96.

In an action against a common carrier to recover the value of an oil painting, the portrait of plaintiff's father, the just rule of damages is the actual value to the owner, its cost and the expenses of replacing it.

So evidence is admissible that plaintiff had no other picture of his father. Green v. B. & L. R. R. 128 Mass. 221.

Where there is no market price in a certain place, because there is no source of supply there, plaintiff can show the market price at the nearest available market and add the cost of transportation. Grand Tower Co. v. Phillips, 23 Wall, 471. See also Long v. Pruyn, 128 Mich. 57, where an inferior grade of fruit trees was delivered.

Where the seller refuses to deliver and the buyer supplies himself before the contract date of delivery has arrived, the measure of damages is the difference between the price at which the goods were actually bought and the contract price. Morris v. Supplee, 208 Pa. 253. See also Kinports v. Breon, 193 Pa. 309; Doolittle v. Murray, 111 N. W. Rep. 999; German Fruit Co. v. Armsby Co. 153 Cal. 585, an action for breach of warranty on sale of dried fruit by sample.

In an action to recover damages for the non-delivery of bonds, the amount of damages sustained by plaintiffs is properly based upon the price of bonds in the city which has the best available market. Zimmerman v. Timmerman, 193 N. Y. 486. See, too, Smith v. Green, L. R. 1 C. P. D. 92, a case involving breach of warranty on sale of a cow.

If no market price is shown by plaintiff, only nominal damages can be awarded. Brown v. Asphalt Mfg. Co. 210 Mo. 260. See, too, Winslow Bros. v. Du Puy, 208 Pa. 98.

Mr. Justice SCOTT says in American Theatre Co. v. Siegel & Co., 221 Ill. 147: "The law does not permit a person to receive goods under a contract, appropriate them to his own use, and then defeat an action for the purchase price, on the ground that the goods were not of the exact quality or description called for by the contract. His remedy, in the absence of a warranty, is to refuse to accept the goods when delivered, or to return them within a reasonable time after the departure from the terms of the contract is discovered. Wolf v. Dietzsch, 75 Ill. 205; Titley v. Enterprise Stone Co. 127 *Id.* 547.

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1) *Damages for Unlawful Discharge.*

DENNIS *v.* MAXFIELD.

Massachusetts, 1865. 10 All. 138.

Contract brought by the master against the owners of the whaling ship Harrison, to recover damages for a breach of a contract by which they had employed him for a whaling voyage. The contract was contained in a shipping paper, for "a whaling voyage of five years' duration from the sailing of the said ship from the port of New Bedford, unless said ship shall sooner return to said port and the voyage be terminated;" and in a written agreement by which it was provided as follows: "The said Dennis agreeing on his part to perform a whaling voyage as master of the said ship Harrison, to the best of his ability and

knowledge; and the said Maxfield as agent on his part agrees to pay for the services of the said Dennis in the manner following: One fourteenth lay on net proceeds of whole cargo, and one dollar per barrel on all sperm oil taken. In addition to the above, to have five hundred dollars if the cargo amounts to $70,000; and $1000 to be added when it shall amount to $90,000; and $2000 more to be added to the aforesaid amount when the cargo amounts to $100,000. Also to have one hundred dollars for each and every thousand dollars that the cargo may exceed one hundred thousand dollars."

The declaration averred that the plaintiff sailed from New Bedford, in pursuance of the above contract, on the 17th of May, 1858, and well and truly performed his duty until the 20th of November, 1860, when the defendants wrongfully deposed and removed him at the Sandwich Islands.

At the trial in this court the plaintiff claimed damages occasioned by his removal and for preventing him from receiving his share of the future earnings of the ship.

BIGELOW, C. J. Of the several rulings made at the trial of this case, three only seem to be open for revision on the exceptions.

1. The first relates to the right of the plaintiff to recover in this action the amount of his share of the earnings which had accrued under his contract with the defendants prior to his removal by them from the command of the vessel. The action is brought for a breach of an entire contract for services. The plaintiff has a right to recover as damages the amount which is lawfully due to him under the stipulations by which his compensation for these services was to be regulated and governed. This includes the wages which he had earned previous to his removal, as well as those which he was prevented from earning by his wrongful discharge. The breach of the contract by the defendants has created only one cause of action in favor of the plaintiff. His compensation for this breach necessarily embraces all that he is entitled to recover under the contract. Indeed his right to recover anything, as well that which was earned before as that which would have been earned if he had not been discharged, depends on the question whether he has performed his part of the contract. A party cannot sever a claim for damages arising under one contract so as to make two distinct and substantive causes of action. We are therefore all of opin-

ion that the sum due to the plaintiff prior to his discharge, when it shall have been ascertained by an assessor, ought to be added to the amount of the verdict.

2. We think it equally clear that the plaintiff is entitled to recover in this action his share or proportion of the future profits or earnings of the vessel after his discharge by the defendants. These constitute a valid claim for damages, because the parties have expressly stipulated that profits should be the basis on which a portion of the plaintiff's compensation for services should be reckoned. These earnings or profits were therefore within the direct contemplation of the parties, when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of estimation; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of copartnership, that the profits of the contemplated business were uncertain, contingent, and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or in an action on a policy of insurance on profits, would it be a valid defence in the event of loss to say that no damages could be claimed or proved because the subject of insurance was merely speculative, and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity? The answer is, that in such cases the parties, having by their contract adopted a contingent, uncertain, and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach. If this is not the rule of law, we do not see that there is any alternative short of declaring that where parties negotiate for compensation or indemnity in the form of an agreement for profits or a share of them, no recovery can be had on such a contract in a court of law,—a proposition which is manifestly absurd.

There are doubtless many cases where no claim for a loss of profits can properly constitute an element of damage in an action for breach of a contract. These, however, are cases in

which there was no stipulation for compensation by a share of the profits, and where they were not within the contemplation of the parties, and did not form a natural, necessary, or proximate result of a breach of the contract declared on Fox v. Harding, 7 Cush. 516. But these cases are no authority for the broad proposition that in no case whatever can profits be included in estimating damages for a breach of a contract. In Johnson v. Arnold, 2 Cush. 46, cited by the defendants' counsel, the court decided only that, in an action for breach of contract for services, by which it was agreed that a party should be compensated by a share of the profits, the damages were not to be limited exclusively to the loss of profits, but might include other elements, if satisfactorily proved. In Brown v. Smith, 12 Cush. 366, the action was against the master of a whaling-vessel for misconduct and mismanagement, by which the voyage was broken up. It was held that no conjectural or possible profits of the voyage could be taken into consideration in estimating the damages. This decision stands on the ground that there were no stipulations in the contract concerning profits, nor were they, so far as appeared, in contemplation of the parties when the contract was made, nor a necessary or proximate consequence of its breach. Besides, it was only a claim for conjectural or possible profits which was rejected by the court in that case, and not profits which were capable of being proved by competent evidence, as in the case at bar.

3. The remaining ground of exception is to the instruction given to the jury that, if the defendants had been injured by any negligence of the plaintiff in the conduct of the voyage, not sufficient to justify his removal and prevent him from maintaining his action, then damages might be recouped or deducted from the damages, if any, which they should find that the plaintiff has sustained by his removal. We doubt very much the correctness of this instruction. It seems to involve the proposition that the plaintiff could recover damages for a breach of the contract, although he had previously been guilty of violating his part of the agreement. But the instruction was given at the express request of the defendants' counsel. It was the rule of law by which he wished the rights of his clients to be tried and determined. * * *

Exceptions overruled.

WOLF *v.* STUDEBAKER.

Pennsylvania, 1870. 65 Pa. 459.

THOMPSON, C. J. We have no question before us involving the fact of an agreement between the plaintiff and defendant, by which the latter agreed to let to the former, on the shares, her farm for one year, from the 1st of April, 1867. The verdict has settled that fact in favor of the plaintiff. The only question before us, therefore, is that relating to damages for the breach of the contract to give possession by the defendant.

The plaintiff claimed to recover the value of his contract, that is to say, what he might reasonably have made out of it, for his damages. In Hoy v. Gronoble, 10 Casey, 10, which, like the case in hand, was to recover damages for a failure, on part of the defendant, to deliver possession of the farm which he had agreed to let to the plaintiff to farm on the shares, the rule as to damages is thus stated in the opinion of the court by Strong, J.: "We cannot say, therefore, that the jury were misled in this case by being told that the damages of the plaintiff should be measured by what he could have made on the farm. This was but another mode of saying that he was entitled to the value of his bargain." This, as a rule, does not seem to have been controverted by the defendant. But she was permitted to prove, under objection, in mitigation of damages, by one Abraham May, as follows:—

"Wolf was engaged in hauling for the bridge in the summer of 1867; he commenced hauling in June, and continued up to the cold weather; before this he was working lots around; after this he marketed some. Wolf and I looked over his books at one time, and his earnings amounted to about $1000; he hauled after this; he hauled hay to his own stable, and some to Bowman's in the latter part of March; his property consists of a house and stable, and about a quarter of an acre of land; I was at Wolf's sale," &c.

The earnings of this man in this way, it was thought by the learned judge, should to the extent of them mitigate the damages arising from the defendant's broken contract; in other words, the logic seemed to be that because he was an industrious man, he was not within the same rule of compensation that one not so would be. There are undoubtedly cases in which such facts do mitigate damages. Such commonly occur in cases of the employment of clerks, agents, laborers, or domestic servants, for

a year or a shorter determinate period. But I have found no case where a disappointed party to a contract for a specific thing or work, who, taking the risk from necessity, of a different business from that which his contract if complied with would have furnished, and shifting for himself and family for employment for them and his teams, is to be regarded as doing it for the benefit of a faithless contractor. It seems to me, therefore, that the rule upon which the testimony quoted was admitted was wrested from its legitimate purpose, and applied to an illegitimate one. In 2 Greenlf. Ev. § 261 a, the distinction is marked between "contracts for specific work and contracts for the hire of clerks, agents, laborers, and domestic servants for a year or shorter determinate periods." In that case the learned author shows that the defendant may prove, on a breach of the contract, "either that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him, and he rejected it."

There is an evident distinction between such a hiring and a contract for the performance of some specific undertaking. In the one case, the party can earn and expect to earn no more than single wages, and if he gets that, his loss will generally be but nominal. King v. Steiren, 8 Wright, 99, was of this nature. Whereas, in the other case the loss of the party is the loss of the benefits of the contract he is prepared to perform. In Costigan v. The Railroad Company, 2 Denio, 609, in a case of hiring for personal service, where the party was dismissed before his term had expired, it was held he was not obliged to seek employment, nor perform services offered him of a different nature from that he had engaged to perform, in order to recover full damages for disappointment. In analogy to this principle, I would say, that where a disappointed contractor for the performance of a specified thing finds something of a different nature from his contract to do, his doing it ought not to mitigate the damages for the breach of his contract by the other party. Indeed, there is enough in the difficulty of applying such a rule to discard it. It would necessarily involve proof of everything, great and small, no matter how various the items done by the plaintiff during the period of the contract might be, and how much he made in the meantime. It happened in this case, that a witness saw the plaintiff's book, and testifies from it that he had earned $1000. The expense incurred in earning it, he did not see, or, if he did, did not dis-

close. But this single case ought not to furnish a rule in other cases. It cannot be that results utterly unconnected with the cause of action and the party sued can be made to tell to his advantage. * * *

We think that that which should mitigate damages in a contract like that we are considering should be something resulting from the acts of the party occasioning the injury, or from the contract itself. The damages may be said to be fixed by the law of the contract the moment it is broken, and I cannot see how that is to be altered by collateral circumstances, independent of, and totally disconnected from it, and from the party occasioning it.

Judgment reversed.

HOWARD *v.* DALY.

New York, 1875. 61 N. Y. 362.

The action was brought upon an alleged contract for employment and service.

The complaint set forth in substance that the plaintiff agreed to act at the Fifth Avenue Theater in New York for the defendant from September 15, 1870, to July 1, 1871, at a salary of $10 per week during the season. She alleged that, though ready and willing to perform, she was not assigned any part, and that she had been paid nothing. From a judgment for $410, defendant appealed.

DWIGHT, C. * * * The next point is, whether the plaintiff was bound, notwithstanding the defendant's act, to keep herself in readiness to perform the contract at all times, or in any form to tender her services. This inquiry involves the correct theory of the nature of the action. Does the plaintiff sue for wages on the hypothesis of a constructive service, or for damages? This question, as far as appears, has never been fully discussed in the appellate courts of this state; and, on account of both its novelty and importance, will be considered at length.

It is very plain, that if a servant has actually performed the service which he has agreed to render under the contract, he has a right to recover wages. That would have been true in the case at bar if the defendant had received her services for the stipulated period. Had he not paid her according to the agreement, her action would have been for the fixed wages. If, on the other hand, she is wrongfully discharged, and the relation

of master and servant is broken off as far as he is concerned, it is clear that she cannot recover for wages in the same sense as if she had actually rendered the service. In an early *nisi prius* case the fiction of a "constructive" service was resorted to, and a servant discharged without cause was allowed to recover wages. Gandell v. Pontigny, 4 Campb. 375. See, also, Collins v. Price, 4 Bing. 132. This view has been discarded in later decisions and has been disapproved by text-writers. [Here the learned commissioner cites authorities.]

These cases and authorities hold, in substance, that if a servant be wrongfully discharged, he has no action for wages, except for past services rendered, and for sums of money that have become due. As far as any other claim on the contract is concerned, he must sue for the injury he has sustained by his discharge, in not being allowed to serve and earn the wages agreed upon. Smith on Master and Servant, 96, note "n"; Elderton v. Emmons, 6 Com. Bench, 187; Beckham v. Drake, 2 Ho. Lords Cases, 606. A servant wrongfully discharged has but two remedies growing out of the wrongful act: (1) He may treat the contract of hiring as continuing, though broken by the master, and may recover damages for the breach. (2) He may rescind the contract; in which case he could sue on a *quantum meruit*, for services actually rendered. These remedies are independent of and additional to his right to sue for wages, for sums actually earned and due by the terms of the contract. This last amount he recovers because he has completed, either in full or in a specified part, the stipulations between the parties. The first two remedies pointed out are appropriate to a wrongful discharge.

To apply these principles to the case at bar, the plaintiff must have been ready and willing to continue in the defendant's service at the time of the latter's refusal to receive her into his employment. 2 Wm. Saund. 352 et seq., note to Peeters v. Opie. It is not necessary, however, that she should go through the barren form of offering to render the service. Wallis v. Warren, 4 Exch. 361; Levy v. Lord Herbert, 7 Taunt. 314; Carpenter v. Holcomb, 105 Mass. 284, and cases cited in opinion by Colt, J. Her readiness, like any other fact, may be shown by all the circumstances of the case. It sufficiently appeared by the conduct of the parties.

After the defendant had declined to give her employment, there was no further duty on the plaintiff's part to be in readi-

ness to perform. If that readiness existed when the time to enter into service commenced, and the defendant committed a default on his part, the contract was broken and she had a complete cause of action. Tender of performance is not necessary when there is a willingness and ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due. Franchot v. Leach, 5 Cow. 506; Cort v. Ambergate & R. R. Co., 17 A. & E. (N. S.) 127. This rule is recognized in Nelson v. Plimpton Fireproof E. Co., 55 N. Y. 480, 484. Her future conduct could not affect her right to sue, though it might bear on the question of damages. She was not obliged to remain in New York or in any form to tender her services after they had been once definitely rejected.

If this theory of the plaintiff's case is correct, her only further duty was to use reasonable care in entering into other employment of the same kind, and thus reduce the damages. This obligation is of a general nature, and not peculiarly applicable to contracts of service. The cases on this point are: Emmons v. Elderton, 4 H. L. Cas. 646; Costigan v. Mohawk & H. R. R. Co., 2 Denio, 609; Dillon v. Anderson, 43 N. Y. 231; Hamilton v. McPherson, 28 N. Y. 76. The uncontradicted testimony was, that this duty was discharged by the plaintiff. She made effort to procure employment, but failed. While it would be unquestionably her duty to accept, if offered, another eligible theatrical engagement, it could scarcely be expected that she should spend much time in actively seeking for employment. Having made some effort and having failed, I think that she was justified, under the known usage in that business of forming companies of actors at certain seasons of the year, and the slight prospect of success in making an engagement after the fifteenth of September, in awaiting the close of the theatrical season. How far a person who is wrongfully discharged from employment is bound to seek it is not, perhaps, fully settled. Chamberlin v. Morgan, 68 Pa. 168; King v. Steiren, 44 Pa. 99. In the first of these cases it is said that it is the duty of a dismissed servant not to remain idle, and that the defendant may show, in mitigation of damages, that the plaintiff might have procured employment. This seems to be a reasonable rule. *Prima facie*, the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employ-

ment has been offered and declined, or, at least, that such employment might have been found. I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found. 2 Greenl. on Ev. § 261, a; Costigan v. M. & H. R. R. Co., 2 Denio, 609.

No such evidence having been offered by the defendant; the plaintiff should recover the whole amount of her stipulated compensation as the damages attributable to the defendant's breach of contract. This, as has been seen, is the true measure of damages. [Citing authorities.]

As far as any authorities are opposed to the theory maintained in the present case, they will appear to rest on the *nisi prius* case of Gandell v. Pontigny, already noticed. Thus in Thompson v. Wood, 1 Hilt. 96, there is a dictum of Ingraham, J., that a servant wrongfully discharged has his election to sue for wages as they become due from time to time, or for damages. This remark that he could sue for wages evidently proceeds on the discarded doctrine of "constructive service." In Huntington v. Ogdensburgh, etc., R. R. Co., 33 How. Prac. 416, there are some remarks of a similar nature by Potter, J., though there is an apparent confusion between a claim for wages, in case the contract is carried out, and for damages, in case it is broken off. The opinion of James, J., as reported in this case in 7 American Law Register (N. S.) 143, appears to be distinct in its adoption of the doctrine of constructive service. It relies on a case in Alabama (Fowler v. Armour, 24 Ala. 194), which distinctly holds that doctrine, and on the dictum of Ingraham, J., in Thompson v. Wood, *supra*. There are two or three other cases in the Southern and Western states that have followed Gandell v. Pontigny: Armfield v. Nash, 31 Miss. 361; Gordon v. Brewster, 7 Wis. 355; Booge v. Pacific R. R. Co., 33 Mo. 212.

This doctrine is, however, so opposed to principle, so clearly hostile to the great mass of the authorities, and so wholly irreconcilable to that great and beneficent rule of law, that a person discharged from service must not remain idle, but must accept employment elsewhere if offered, that we cannot accept it. If a person discharged from service may recover wages, or treat the contract as still subsisting, then he must remain idle in order to be always ready to perform the service. How absurd it would be that one rule of law should call upon him to accept other employment, while another rule required him to remain idle in

order that he may recover full wages. The doctrine of "constructive service" is not only at war with principle, but with the rules of political economy as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor; and no rule can be sound which gives him full wages while living in voluntary idleness. For these reasons, if the plaintiff was discharged after the time of service commenced, she had an immediate cause of action for damages, which were *prima facie* a sum equal to the stipulated amount, unless the defendant should give evidence in mitigation of damages.

The next inquiry is as to the rule to be followed in case the defendant's denial of the contract preceded the time for entering into the service. It is now a well settled rule that if a person enters into a contract for service, to commence at a future day, and before that day arrives does an act inconsistent with the continuance of the contract, an action may be immediately brought by the other party; and of course, without averring performance, or readiness to perform. The leading cases on that subject are Hochster v. De La Tour, 2 Ellis & Black, 678; Frost v. Knight, Law Rep. 7 Exch. 111, reversing s. c. in L. R. 5 Exch. 322; Roper v. Johnson, Law Rep. 8 Com. Pleas, 167; Burtis v. Thompson, 42 N. Y. 246; Crist v. Armour, 34 Barb. 378.

In Hochster v. De La Tour the facts were, that the plaintiff had agreed to enter the service of the defendant as a courier, on June 1, 1852, and to serve in that capacity for three months, from the 1st of June, at a specified monthly salary. Before that day arrived, the defendant wholly refused to employ the plaintiff in the capacity aforesaid, and wholly discharged him from the agreement. The action was commenced on June 22, 1852. The court held that the action was well brought, on the ground that it was an act done inconsistent with the relation of master and servant, and, accordingly, not so much a breach of the express agreement, as of an implied contract, in no way to do any thing to the prejudice of the opposite party, inconsistent with that relation.

Another form of statement is, that the party renouncing his engagement cannot complain if the opposite party takes him at his word, and treats him as having broken the contract. This

doctrine results in the rule, that the opposite party has an option either to treat the contract as subsisting, and when the day arrives for commencing to serve to offer to perform, or to regard it as immediately broken, and to sue before the day arrives. This theory of an option is not objectionable, since, before the day for performance arrives, a party would not be bound to accept other employment, if offered, as he would be if the contract were broken off after that time. The principle that governs the one case is plainly not applicable to the other.

This case, at first, met with doubt, and even adverse criticism. It was powerfully assailed by Chief Baron Kelly, of the Court of Exchequer, in Frost v. Knight, L. R. 5 Exch. 322. His arguments were carefully considered on an appeal of that case to the Court of Exchequer Chamber, where the doctrine of Hochster v. De La Tour was fully confirmed, and it is now accepted law. S. c., L. R. 7 Exch. 111. Other cases to the same effect are Danube & Black Sea Co. v. Xenos, 13 C. B. (N. S.) 825, and Wilkinson v. Verity, L. R. 6 C. P. 206. The result of the cases is stated by Cockburn, C. J., in Frost v. Knight, in the Exchequer Chamber, in the following terms: "The law with reference to a contract to be performed at a future time, where the party bound to the performance announces, prior to the time, his intention not to perform it, as established by the cases [citing them], may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive, for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time; subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

"This is now settled law, notwithstanding any thing that may have been held or said in Philpotts v. Evans, 5 M. & W. 475, and Ripley v. McClure, 4 Exch. 359." Pages 112, 113.

This principle was recognized in the very recent case of Roper v. Johnson, L. R. 8 C. P. 167, where the further rule was laid down, as a deduction from the decisions above stated, that in case the plaintiff elected to treat the contract (for the delivery of coal) as broken, by the refusal of the defendant to perform prior to the days designated for delivery, the measure of damages was *prima facie* the difference between the contract price and the market price at the several periods fixed for delivery, notwithstanding those periods had not all elapsed when the action was brought, nor even when it was tried. The damages could be mitigated by proof that the plaintiff could have procured the coal at lower rates. As no such proof was offered, the full difference between the two rates was recovered. There is also a *dictum* in Brown v. Muller, L. R. 7 Exch. 323, to the same effect.

The question now under consideration was discussed in Crist v. Armour, 34 Barb. 378, and the case of Hochster v. De La Tour approved. The facts in Crist v. Armour did not involve the precise point in the case at bar, since the vendor, who had contracted to sell a quantity of cheese at a specified day, sold it to another before that day arrived, and put it out of his power to perform the contract. The principle is substantially the same, however, as that adopted in the English cases. No appreciable distinction can be stated between the present case and that of Burtis v. Thompson, 42 N. Y. 246. In that case there was an engagement to marry "in the fall." The defendant announced to the plaintiff, in October, that he would not perform his contract. It was held that an action commenced immediately was not premature. The opinions given by Ingalls, J., and Grover, J., do not proceed on the same theory. The view of the latter judge coincides, in substance, with that of Hochster v. De La Tour, and is the only one on which the judgment can properly be supported. The fair construction of the words "in the fall," would have given the defendant until the last day of November to perform had there been no refusal on his part. It was the renunciation of his contract in October which made the action not premature. If the case is good law, it is difficult to maintain any distinction between it and the contract of service. Chief Baron Kelly, in Frost v. Knight, *supra*, attempted to draw

a distinction between the contract of marriage and the other contracts. This was discarded by the Court of Exchequer Chamber, which held the rule in Hochster v. De La Tour to be universal in its application to contracts to be performed at a future day; though I presume that it would scarcely be extended to mere promises to pay money, or other cases of that nature, where there are no mutual stipulations.

The whole result of the discussion may now be summed up. If the defendant in the case at bar repudiated his contract with the plaintiff after the time of performance had arrived, the plaintiff had an action for damages. Her interview with the defendant sufficiently showed her readiness to perform. Her action was for damages for not being permitted to work, and not for wages; and the defendant might show affirmatively, and by way of mitigation of damages, that she had opportunities to make a theatrical engagement elsewhere, which she did not accept. Without such proof she was entitled to recover the full amount of the compensation stipulated in the contract.

On the other hand, if the defendant rejected the services of the plaintiff before the time of performance arrived, she had an election either to consider his act as a breach of an implied contract with her to take her into his service, and bring an immediate action; or to wait till the appointed day arrived, and then be in readiness to render her services. Her election will be evidenced by her acts. Having made no tender of her services at the appointed day, the presumption is, that she considered the act of repudiation by the defendant as final, and now brings her action for damages. Her complaint in the action and the evidence taken at the trial are sufficient to establish such a claim. Her damages are, as in the other hypothesis, *prima facie* the entire amount of her compensation, unless proof was offered in mitigation of damages, which was not done. In either aspect of the case the verdict and judgment were right.

My brethren concur with me upon the first ground set forth in this opinion, without expressing their views upon the correctness of the rule in Hochster v. De La Tour, and kindred cases.

The judgment of the court below must be affirmed. All concur. *Judgment affirmed.*

SUTHERLAND *v.* WYER.

Maine, 1877. 67 Me. 64.

Assumpsit to recover damages for breach of contract under which plaintiff agreed to play for defendants at a museum in Portland, Maine.

VIRGIN, J. The plaintiff contracted with the defendants to "play first old man and character business, at the Portland museum, and to do all things requisite and necessary to any and all performances which" the defendants "shall designate, and to conform strictly to all the rules and regulations of said theatre," for thirty-six weeks, commencing on Sept. 6, 1875, at thirty-five dollars per week; and the defendants agreed "to pay him thirty-five dollars for every week of public theatrical representations during said season." By one of the rules mentioned, the defendants "reserved the right to discharge any person who may have imposed on them by engaging for a position which, in their judgment, he is incompetent to fill properly."

The plaintiff entered upon his service under the contract, at the time mentioned therein, and continued to perform the theatrical characterizations assigned to him, without any suggestion of incompetency, and to receive the stipulated weekly salary, until the end of the eighteenth week; when he was discharged by the defendants, as they contended before the jury, for incompetency under the rule; but, as the plaintiff there contended, for the reason that he declined to accept twenty-four dollars per week during the remainder of his term of service.

Three days after his discharge and before the expiration of the nineteenth week, the plaintiff commenced this action to recover damages for the defendants' breach of the contract. The action was not premature. The contract was entire and indivisible. The performance of it had been commenced, and the plaintiff been discharged and thereby been prevented from the further execution of it: and the action was not brought until after the discharge and consequent breach. Howard v. Daly, 61 N. Y. 362, and cases. Dugan v. Anderson, 36 Md. 567, and cases. The doctrine of Daniels v. Newton, 114 Mass. 530, is not opposed to this. Neither do the defendants insist that the action was prematurely commenced; but they contend that the verdict should be set aside as being against the weight of evidence.

The verdict was for the plaintiff. The jury must, therefore,

have found the real cause of his discharge to be his refusal to consent to the proposed reduction of his salary. The evidence upon this point was quite conflicting. Considering that all the company were notified, at the same time, that their respective salaries would be reduced one-third, without assigning any such cause as incompetency; that no suggestion of the plaintiff's incompetency was ever made to him, prior to his discharge; and that his written discharge was equally silent upon that subject, we fail to find sufficient reason for disturbing the verdict upon this ground of the motion, especially since the jury might well find as they did on this branch of the case, provided they believed the testimony in behalf of the plaintiff.

There are several classes of cases founded both in tort and in contract, wherein the plaintiff is entitled to recover, not only the damages actually sustained when the action was commenced, or at the time of the trial, but also whatever the evidence proves he will be likely to suffer thereafter from the same cause. Among the torts coming within this rule are personal injuries caused by the wrongful acts or negligence of others. The injury continuing beyond the time of trial, the future as well as the past is to be considered, since no other action can be maintained. So in cases of contract the performance of which is to extend through a period of time which has not elapsed when the breach is made and the action brought therefor and the trial had. Remelee v. Hall, 31 Vt. 582. Among these are actions on bonds or unsealed contracts stipulating for the support of persons during their natural life. Sibley v. Rider, 54 Maine, 463. Philbrook v. Burgess, 52 Maine, 271.

The contract in controversy falls within the same rule. Although, as practically construed by the parties, the salary was payable weekly, still, when the plaintiff was peremptorily discharged from all further service during the remainder of the season, such discharge conferred upon him the right to treat the contract as entirely at an end, and to bring his action to recover damages for the breach. In such action he is entitled to a just recompense for the actual injury sustained by the illegal discharge. *Prima facie*, such recompense would be the stipulated wages for the remaining eighteen weeks. This, however, would not necessarily be the sum which he would be entitled to; for, in cases of contract as well as of tort, it is generally incumbent upon an injured party to do whatever he rea-

sonably can, and to improve all reasonable and proper opportunities to lessen the injury. Miller v. Mariners' Church, 7 Maine, 51, 56; Jones v. Jones, 4 Md. 609; 2 Greenl. Ev. § 261, and notes; Chamberlin v. Morgan, 68 Pa. St. 168; Sedg. on Dam. (6th ed.) 416, 417, cases *supra*. The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere, during the remainder of the term; and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages. And this balance, with interest thereon, should be the amount of the verdict. Applying the rule mentioned, the verdict will be found too large.

By the plaintiff's own testimony, he received only $60, from all sources after his discharge,—$25 in February and $35 from the 10th to the 20th of April, at Booth's. His last engagement was for eight weeks, commencing April 10, which he abandoned on the 20th, thus voluntarily omitting an opportunity to earn $57, prior to the expiration of his engagement with the defendants, when the law required him to improve such an opportunity, if reasonable and proper. We think he should have continued the last engagement until May 6, instead of abandoning it and urging a trial in April, especially inasmuch as he could have obtained a trial in May, just as well. The instructions taken together were as favorable to the defendants as they were entitled to.

If, therefore, the plaintiff will remit $57, he may have judgment for the balance of the verdict; otherwise the entry must be verdict set aside and new trial granted.

All concur.

McMULLEN *v.* DICKINSON CO.

Minnesota, 1895. 60 Minn. 156.

CANTY, J. On the 25th of February, 1892, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name 50 shares of the capital stock of said corporation, fully paid up, and the business of said corporation shall be continued, not exceeding the term of the existence of said corporation, and pay

him for such services the sum of $1,500 per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the 50 shares of said stock, and performed said services ever since that time until the 28th of October, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of $125 for each of the months of March and April, 1894, and prays judgment for the sum of $250. The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of $512, for the period of time from his said discharge to the 1st of March, 1894, alleging the same facts and the same breach, and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs, and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord Ellenborough in Gandell v. Pontigny, 4 Campb. 375, and this case was followed in England and this country for a long time (Wood, Mast. & Serv. 254), and is still upheld by several courts (Isaacs v. Davies, 68 Ga. 169; Armfield v. Nash, 31 Miss. 361; Strauss v. Meertief, 64 Ala. 299). It has been repudiated by the courts of England (Goodman v. Pocock, 15 Adol. & E. [N. S.] 574; Wood, Mast. & Serv. 254), and by many of the courts in this country (Id.; and notes to Decamp v. Hewitt, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any remedy except one for damages, which, if seem-

ingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profit for the breach of other contracts, and hold that the contract is entire, even though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken. See James v. Allen Co., 44 Ohio St. 226; Moody v. Leverich, 4 Daly (N. Y.) 401; Colburn v. Woodworth, 31 Barb. (N. Y.) 381; Booge v. Railroad Co., 33 Mo. 212.

No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur.

This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been employed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed. 2 Suth. Dam. 471; Gordon v. Brewster, 7 Wis. 355; Fowler & Proutt v. Armour, 24 Ala. 194; Wright v. Falkner, 37 Ala. 274; Colburn v. Woodworth, 31 Barb. (N. Y.) 385.

Then, if the discharged servant can have but one action, it

is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial. Under this rule, the measure of damages for the breach of a 30 year contract is no greater than for the breach of a 6 or 7 year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. If the rule of damages were the same, then, in the case of the breach of the contract for service, the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages; and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented him." 1 Suth. Dam. 107.

It is our opinion that the servant wrongfully discharged is en-

titled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logical. It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial.

The order appealed from should be affirmed. So ordered.

Where plaintiff who has made a contract to render personal services, is prevented from carrying it out by an act of the employer, the plaintiff is not bound, in order to reduce defendant's obligation to him, to accept and continue in the employ of defendant himself at a reduced compensation. Chisholm v. Preferred Bankers, 112 Mich. 55.

"Where a party is wrongfully discharged by the employer before the expiration of the contract period, he may wait until such period arrives and then recover against the employer the wages he would

have earned but for such wrongful discharge, less what he could have earned by employment elsewhere, which will be in reduction of damages." Winkler v. Racine Co., 99 Wis. 187.

Where a party agrees to take an advertisement and pay therefor, he may nevertheless stop performance by an absolute renunciation of the contract. The newspaper proprietor can get damages for the breach, minus such sum as he might have obtained by the use of reasonable efforts to obtain other advertisements at the best price obtainable. Tradesman Co. v. Superior Mfg. Co., 147 Mich. 705. See also Keystone Pub. Co. v. Roman, 116 N. Y. Supp. 654.

In Chase v. Alaska F. & L. Co. 2 Alaska Reports 82, it was held that when a servant is wrongfully discharged, but his wages are paid up to that time, he cannot recover for future instalments for constructive service, but only for the breach of contract.

In Peterson v. Drew, 2 Alaska Reports 560, where a contract for labor for a fixed wage and period is broken by the discharge of the laborer, he cannot recover full wages if he fails to exercise reasonable diligence in seeking other employment, and thus reducing, or attempting to reduce the damages or loss to himself resulting from the wrongful discharge.

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4. *Breach of Contract to Transport Passengers.*

HOBBS *v.* LONDON & SOUTHWESTERN RAILWAY.

Queen's Bench, 1875. L. R. 10 Q. B. 111.

Action to recover damages for breach of contract.

COCKBURN, C. J., We are of opinion that this rule should be made absolute as regards the 20 l. damages given in respect of the consequences of the wife having caught cold in this walk from Esher to Hampton; but that it should be discharged as regards the 8 l. in respect to the personal inconvenience suffered by the husband and the wife in consequence of their not being taken to, or put down at their proper place of destination.

The facts are simple. The plaintiffs took tickets to be conveyed from the Wimbledon station of the defendants' railway to Hampton Court. It so happened that the train did not go to Hampton Court, and the plaintiffs were taken on to Esher Station, which increased the distance which they would have to go from the railway station to their home by two or three miles.

Damages were asked for upon two grounds: first, for the inconvenience that the husband and wife, with their two children, sustained by having to go this distance, the night happen-

ing to be a wet night; in the second place, damages were asked by reason of the wife, from her exposure to the wet on that night, getting a bad cold and being ill in health, the consequence of which was that some expense was incurred in medical attendance upon her. We think these two heads of damage must be kept distinct, and I propose to deal with them as distinct subjects.

With regard to the first, there can be no doubt whatever upon the facts that the plaintiffs were put to personal inconvenience: they had to walk late at night, after twelve o'clock, a considerable distance, the wife suffered fatigue from it, and they had to carry their children or to get them along with great difficulty, the children being fatigued and exhausted; and there is no doubt that there was personal inconvenience suffered by the party on that occasion, and that inconvenience was the immediate consequence and result of the breach of contract on the part of the defendants. The plaintiffs did their best to diminish the inconvenience to themselves by having recourse to such means as they hoped to find at hand; they tried to get into an inn, which they were unable to do; they tried to get a conveyance; they were informed none was to be had; and they had no alternative but to walk; and therefore it was from no default on their part, and it cannot be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendants' contract to convey them to Hampton Court. Now inasmuch as there was manifest personal inconvenience, I am at a loss to see why that inconvenience should not be compensated by damages in such an action as this. It has been endeavored to be argued, upon principle and upon authority, that this was a kind of damage which could not be supported; and attempts were also made to satisfy us that this supposed inconvenience was more or less imaginary, and would depend upon the strength and constitution of the parties, and various other circumstances; and that it is not to be taken that a walk of so many additional miles would be a thing that a person would dislike or suffer inconvenience from; and that there may be circumstances under which a walk of several miles, so far from being matter of inconvenience, would be just the contrary. All that depends on the actual facts of each individual case; and if the jury are satisfied that in the particular instance personal inconvenience or suffering has been occasioned, and that it has been occasioned as the immediate effect of the breach of the contract, I can see no

reasonable principle why that should not be compensated for. The case of Hamlin v. Great Northern Ry. Co., 1 H. & N. 408; 26 L. J. (Ex.) 20, was cited as an authority to show that for personal inconvenience damages ought not to be awarded. That case appears to me to fall far short of any such proposition. It merely seems to amount to this: that where a party, by not being able to get to a place which he would otherwise have arrived at in time to meet persons with whom he had appointments, had sustained pecuniary loss, that is too remote to be made the subject of damages in an action upon a breach of contract. That may be perfectly true, because, as in every one of the instances cited, you would have to go into the question whether there was a loss arising from the breach of contract, before you could assess that loss. And, after all, if the true principle be laid down in Hadley v. Baxendale, 9 Ex. 341; 23 L. J. (Ex.) 179, the damage must be something which is in the contemplation of the parties as likely to result from a breach of contract; and it is impossible that a company who undertake to carry a passenger to a place of destination can have in their minds all the circumstances which may result from the passenger being detained on the journey. As far as the case of Hamlin v. Great Northern Ry. Co. goes, I am far from saying it was a wrong decision; but it did not decide that personal inconvenience, however serious, was not to be taken into account as a subject-matter of damage in a breach of contract of a carrier to convey a person to a particular destination. If it did, I should not follow that authority; but I do not think it applicable to this case at all. I think there is no authority that personal inconvenience, where it is sufficiently serious, should not be the subject of damages to be recovered in an action of this kind. Therefore, on the first head, the 8 l., I think the verdict ought to stand.

With regard to the second head of damage, the case assumes a very different aspect. I see very great difficulty indeed in coming to any other conclusion than that the 20 l. is not recoverable; and when we are asked to lay down some principle as a guiding rule in all such cases, I quite agree with my Brother Blackburn in the infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases; but I think that the nearest approach to anything like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should

be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. As my Brother Blackburn points out, so far as the inconvenience of the walk home is concerned, that must be taken to be reasonably within the contemplation of the parties; because, if a carrier engages to put a person down at a given place, and does not put him down there, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of his destination somehow or other. If there are means of conveyance for getting there, he may take those means and make the company responsible for the expense; but if there are no means, I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately that the damage resulting must be admitted to be fair subject-matter of damages. But in this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it: and if in such a case the party recovered damages by reason of the cold caught incidentally on that foot journey,

it would be necessary, on the principle so applied, to hold that in two cases which have been put in the course of the discussion, the party aggrieved would be equally entitled to recover. And yet the moment the cases are stated, everybody would agree that, according to our law, the parties are not entitled to recover. I put the case: Suppose in walking home, on a dark night, the plaintiff made a false step and fell and broke a limb, or sustained bodily injury from the fall, everybody would agree that that is too remote, and is not the consequence which, reasonably speaking, might be anticipated to follow from the breach of contract. A person might walk a hundred times, or indeed a great many more times, from Esher to Hampton without falling down and breaking a limb; therefore it could not be contended that that could have been anticipated as the likely and the probable consequence of the breach of contract. Again, the party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of those causes, it might be said: "If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or to go from Esher to Hampton in a carriage, and I should not have met with the accident in the walk or in the carriage." In either of those cases the injury is too remote, and I think that is the case here; it is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold. That cannot be said to be within the contemplation of the parties so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences. Therefore, as regards the damages awarded in respect of the wife's cold, the rule must be made absolute to reduce the damages by that amount.

BLACKBURN, J. I am of the same opinion. I think the rule should be made absolute to reduce the damages to 8 l. beyond the 2 l. paid into court, but should not be made absolute any further. The action is in reality upon a contract; it is commonly said to be founded upon a duty, but it is a duty arising out of a contract. It is a contract by which the railway company had undertaken to carry four persons to Hampton Court, and in fact that contract was broken when they landed the passengers at Esher, instead of Hampton Court. The contract

was to supply a conveyance to Hampton Court, and it was not supplied. Where there is a contract to supply a thing and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. * * * Therefore on the first head of damages in this case, I do not see that we can cut down the damages below what the jury have found.

Then comes the further question, whether the damages for the illness of the wife are recoverable; I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation; and therefore I agree with what my Lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the court, though you cannot draw the precise line, you can say on which side of the line the case is; I do not see the analogy between this case and the case that was suggested, where a railway company made a contract to carry a passenger, and from want of reasonable care they dashed that passenger down and broke his leg, and he recovers damages from them. For such a breach as that, the most direct, immediate consequence is, that he would be lamed. That is the direct consequence of such a breach of contract; but though here the contract is the same, a contract to carry the passenger, the nature of the breach is quite different; the nature of the breach is simply that they did not carry the plaintiff to his destination, but left him at Esher. To illustrate this,—Suppose you expand the declaration, and say: You, the defendants, contracted to carry me safely to Hampton Court, you negligently upset the carriage and dashed me on the ground,

whereby I became ill and sick. That is a clear and immediate consequence. The other case is: You contracted to carry me to Hampton Court, you went to Esher, and put me down there, by which I was obliged to get other means of conveyance, for the purpose of getting to Hampton Court; and because I could find no fly or other conveyance, I was obliged, as the only means of getting to Hampton, to walk there, and because it was a cold and wet night, I caught cold, and I became ill. When it is put in that way, there are many causes or stages which there are not in the other.

With regard to the two instances my Lord put,—one, of the passenger, when walking home in the dark, stumbling and breaking his leg; the other, of his hiring a carriage, and the carriage breaking down,—I must say I think they are on the remote side of the line, and further from it than the present case. I do not think it is any one's fault that it cannot be put more definitely; I think it must be left as vague as ever, as to where the line must be drawn; but I think in each case the court must say whether it is on the one side or the other; and I do not think that the question of remoteness ought ever to be left to a jury; that would be in effect to say that there shall be no such rule as to damages being too remote; and it would be highly dangerous if it was to be left generally to the jury to say whether the damage was too remote or not.

I think, therefore, the rule ought to be made absolute to reduce the damages to the 8 l. beyond the 2 l.

MELLOR, J., and ARCHIBALD, J., write saying that they are of the same opinion.

Rule accordingly.

TURNER *v.* GREAT NORTHERN RY. CO.

Washington, 1896. 15 Wash. 213.

The plaintiff and his wife purchased through tickets from St. Paul, Minn., to Spokane, Wash., over the defendant company's road, the latter then knowing that through transportation was impossible over its lines owing to a serious break in its roadbed, which fact it fraudulently and negligently concealed. At Havre, Mont., the plaintiff was directed to leave the train, to proceed to Helena, and then to take the road of the Northern Pacific Railroad Company, which company, the defendant stated, would

honor plaintiff's ticket. This it, however, refused to do. Plaintiff was compelled to pay fare, and afterward was delayed at Missoula for 18 days by reason of floods. A verdict was rendered for $750, and from a judgment in favor of plaintiff this appeal is prosecuted.

ANDERS, J. * * * In answer to the question, "Now Colonel, I wish you would go on and state to the jury what, if any, anxiety, worriment, etc., you suffered on account of your delay, being separated from your baggage, and all of those things that are proper under the ruling of the court; in consequence of this delay," the plaintiff was allowed, notwithstanding the defendant's objection, to testify that he was greatly worried, troubled, and annoyed by the combination of circumstances surrounding him at that time, among which were that he had to pay out more money than he had contemplated paying out; that the Northern Pacific Railroad Company would not board him at Missoula, as they did their passengers; his means were limited, and he did not know how long he had to stay there; that he could not hear from home, the telegraph line being broken down; that his wife was taken sick, and lay in bed three days, in consequence of her worriment, and that he could not make her comfortable under the circumstances.

Damages for "worriment" and disappointment resulting from such circumstances are too remote to be recovered in this action. The mental anxiety of the plaintiff induced by the sickness of his wife and his inability to make her comfortable, or his limited means, or his inability to hear from home owing to the interruption of telegraphic communication, cannot be regarded as the proximate result of the alleged wrongful acts, or omissions of the defendant, and the court therefore erred in permitting this testimony to be submitted to the consideration of the jury.

The court also erred, and for the same reason, in instructing the jury generally that the plaintiff was entitled to recover, for worry and mental excitement such sum as would fairly and reasonably compensate him therefor. "Damages will not be given for mere inconvenience and annoyance, such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury." 1 Sedgwick on Damages (8th Ed.) § 42.

And hence damages cannot be recovered for anxiety and suspense of mind in consequence of delay caused by the fault of

a common carrier. Trigg v. Railway Co., 74 Mo. 147; Hobbs v. Railway Co., L. R. 10 Q. B. 111; Hamlin v. Railway Co., 1 Hurl. & N. 408; Walsh v. Railway Co., 42 Wis. 23. * * *

Surely no court could say that, in contemplation of law, the mental agitation or excitement caused by being delayed on a journey is of a different character from that produced by unexpectedly having to pay extra fare for transportation. The mental sensation in each case, whether it be called excitement, anxiety, annoyance, or worry, is manifestly the result of disappointed hope or expectation merely, for which, as we have seen, no damages can be awarded. The most trustworthy basis of damages was not adopted in the trial of this case. There was no proof whatever of what the plaintiff actually earned, as an attorney, either before or after the particular time in question. * * * We are inclined to the opinion that it was hardly proper to prove what the time of practicing attorneys was worth, as that would constitute no fair basis of damages, where the value of a person's time depends so much upon his individual exertions.

The judgment must be reversed and the cause remanded for a new trial.

HOYT, C. J., and GORDON, J., concur, DUNBAR, J. dissents.

COOLEY *v.* PENNSYLVANIA R. CO.

New York, 1903. 40 Misc. 239.

GIEGERICH, J. This action was brought to recover damages claimed by the reason of delay in transporting the plaintiff as a passenger on defendant's railroad. * * *

The facts in the case are practically undisputed, and, as far as material, are as follows: On or about the 10th day of December, 1899, the plaintiff, in the city of New York, purchased a ticket to Philadelphia and return. On his return he left Philadelphia on the 7:33 o'clock a. m. train, December 11th, which was due in New York at 9:30 o'clock a. m., as appeared by the time-tables published by the defendant. At the time when he started there had been a wreck upon the line of defendant's road, of which the plaintiff was not informed. Owing to the wreck, the train did not reach New York until half-past 3 o'clock in the afternoon. In the meanwhile, a case in which he was attorney for the plaintiff had been called in the City Court of the city of New York at

10 o'clock in the morning, and, owing to his failure to appear, the case had been dismissed, although he had telegraphed to his own office and to the judge before whom the case was to be tried that he could not be there on time. The plaintiff, having his return ticket, did not have to purchase one, and before starting from Philadelphia he did not disclose to any servant or officer of the defendant his profession or the nature of his business on that day. He testified that he told the conductor when on the train at Trenton that he had a court engagement, but at that time it was impossible for him to be transported to New York in time to be present at the call of the City Court calendar. The fact that there was a delay of several hours called upon the defendant to show, if it could, that such delay was the result of inevitable accident or that it was excusable. This it did not do, and therefore the question for us to determine is, what measure of damages should have been applied to the case?

It is well established that, in order to hold the carrier for damages beyond those which accrue upon his negligent delay naturally and in the order of things, he must be informed of the special circumstances which make promptness on his part important to the passenger, and which may occasion exceptional damages as the result of his delay—in other words, that both parties to the contract must be fully informed as to the circumstances and the reasons why it is important to the passenger to arrive at on or about the schedule time. De Leon v. McKernan, 25 Misc. Rep. 182; Hadley v. Baxendale, 9 Exch. 341; North American Transportation & Trading Co. v. Morrison, 178 U. S. 262; Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Hutchinson on Carriers, § 773, p. 920. This rule would exclude the $20 paid by the plaintiff to open the default, even if the plaintiff were liable for the same; but an attorney is not liable for costs in such a case, and if he chose to pay them, it was a voluntary act on his part.

In our opinion, the only damages which can be recovered in this case are compensatory, merely, and such as would naturally and in the order of things flow from the delay; and these, under the facts presented in this case, would be the value of his time for the period covered by the delay, which is to be measured, not by the largest sums he has earned for such time, nor by the smallest, but by an average of what he has earned for at least a year immediately preceding the time of the occurrence. Walker v.

Erie R. Co., 63 Barb. 260. Now, as to such value, the only evidence in the case is the following testimony given by the plaintiff:

"Q. What were your services reasonably worth for the time? A. Depending on the kind of case it is—from $50 to $100 a day. Q. Do you consider $75 a reasonable compensation a day? A. I do."

This clearly does not have reference to the plaintiff's average earnings for any given period of time, but is a mere estimate of what he might have charged under certain circumstances, "depending on the kind of case" he might have had, and is not a sufficient basis for determining the value of such time. We therefore think the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

FREEDMAN, P. J., concurs. GILDERSLEEVE, J., takes no part.

GILLESPIE *v.* BROOKLYN HEIGHTS R. R. CO.

New York, 1904. 178 N. Y. 347.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Elizabeth S. Gillespie against the Brooklyn Heights Railroad Company. From a judgment of the Appellate Division affirming a judgment for defendant, plaintiff appeals.

On the 26th of December, 1900, the plaintiff, who was a practicing physician, boarded one of the defendant's cars at the corner of Nostrand avenue and Fulton street at about 10:20 in the morning. As to what thereafter occurred the plaintiff testified: "I know who the conductor was on that car: Conductor Wright. He came to collect my fare just a few minutes after I got on the car. I gave him a twenty-five cent piece, and said to him, 'A transfer, please, to Reid avenue.' Just at that moment a lady on the opposite side called to him. He crossed, and he went to punch a transfer, and I thought it was mine, and I said to him, 'Please don't do that until I speak with you.' He paid no attention. After he gave the lady her transfer, I said to him: 'Won't you please come here? I wish to speak to you about the transfer?' So he came across very growly and roughly, and wanted to know, 'What is the matter with you?' I said, 'Won't

you please tell me—I don't know much about those streets away up here—which would be the nearest, Reid avenue or Sumner avenue, to Stuyvesant avenue.' He said, 'We don't have any Reid avenue transfers; we transfer at Sumner avenue.' 'Well,' I said then, 'I thank you; please give me a transfer for Sumner avenue and my change;' and he actually hollowed at me, 'What change?' I said, 'The money I gave you, twenty-five cents; and I want my change;' and he put his hands in his pocket, and he pulled out a whole handful of pennies or nickels. He said, 'Do you see any twenty-five cents there?' He said: 'It is the likes of ye. You are a deadbeat. You are a swindler. I know the likes of ye.' He said, 'You didn't give me twenty-five cents.' The lady that sat next to me set the conductor right. She said to him, 'I am sure, sir, she gave you a quarter of a dollar; I saw her give it to you;' and he turned, 'Well, perhaps you are a friend of hers.' Then he said that deadbeats like me, he knew that every day they were traveling on the cars; he knew the swindlers and the deadbeats. 'But you can't deadbeat me. I know you. You belong to them;' and he said then, 'Why, only here the other day I had just such a woman as you trying to deadbeat me out of money;' and I said, 'I want my change, and I don't want such insolence.' Then he walked back, and two gentlemen got on the car, and he called the attention of those gentlemen to me, and said, pointing to me—I went to the door, and he was telling them how I was trying to swindle him. 'But,' he said, 'I know them. They are all deadbeats. She can't beat me.' I said to him, 'Look here, sir; I know President Rossiter, and I shall make a complaint of you;' and he came over close to me. He said, 'Ah, the likes of you,' he said. 'You couldn't make a complaint to President Rossiter,' he said. 'I have been on this road too long for you to have any authority with him; no, no.' 'Well,' I said, 'I shall tell him,' and I went back and sat down.'' The plaintiff further and in substance testified that she noticed that there was a smell of whiskey in the conductor's breath; that he did not give her her change at all; that he gave her no transfer; that he said nothing except merely that he had nothing to do with her, and that ''I was a deadbeat and a swindler.'' She then testified as to her efforts to see President Rossiter; that when she reached his office she was about four miles from home; that she walked that distance because she had no money with which to pay her fare; that

she became sick, was confined to the bed for two days, and as to its effect upon her business. All this evidence was undisputed. At the close of the plaintiff's case the defendant made a motion for a dismissal of the complaint, and the court said: "The allegation of the complaint is that it was done maliciously by the servant of the corporation, so that takes it out of the action against the corporation anyway, so far as the slander part of it is concerned. The only question now is whether she is entitled to recover the amount that she paid for the fare." The plaintiff claimed she was entitled to recover more. The court thereupon said: "On the testimony as it stands they [the company] did receive it. It is uncontradicted now that they did receive it. I think I will direct a verdict for the twenty cents if you [referring to the defendant's counsel] want to." The plaintiff excepted to the direction of a verdict, and asked to go to the jury "upon the facts in the case, upon the wrong and the wrongful detention of this woman's money, and the suffering occasioned by it," and the court directed a verdict for the plaintiff for 20 cents, and held that that was the extent to which the railroad company was liable, and that "the other damages, if any have grown out of it, are not the proximate result of the act of the conductor." The verdict was directed with the consent of the defendant's counsel.

MARTIN, J. The principal and practically the only, question involved upon this appeal is whether the plaintiff was entitled to recover for the tort or breach of contract proved an amount in excess of the sum she actually overpaid the defendant's conductor. Confessedly, the plaintiff was a passenger on the defendant's car, and entitled to be carried over its road. That at the time of this occurrence the relation of carrier and passenger existed between the defendant and the plaintiff is not denied. The latter gave the conductor a quarter of a dollar from which to take her fare. He received it, but did not return her the 20 cents change to which she was entitled. She subsequently asked him for it, when he, in an abusive and impudent manner, not only refused to pay it, but also grossly insulted her by calling her a deadbeat and a swindler, and by the use of other insulting and improper language, even after a fellow passenger had informed him that she had given him the amount she claimed. In this case there was obviously a breach of the defendant's contract and of its duty to its passenger. It was its duty to receive

any coin or bill not in excess of the amount permitted to be tendered for fare on its car under its rules and regulations, and to make the change, and return it to the plaintiff, or person tendering the money for the fare. That certainly must have been a part of the contract entered into by the defendant, and the refusal of the conductor to return her change was a tortious act upon his part, performed by him while acting in the line of his duty as the defendant's servant. To that extent, at least, the contract between the parties was broken, and as an incident to and accompanying that breach the language and tortious acts complained of were employed and performed by the defendant's conductor.

This brings us to the precise question whether, in an action to recover damages for the breach of that contract and for the tortious acts of the conductor in relation thereto, the conduct of such employé and his treatment of the plaintiff at the time may be considered upon the question of damages, and in aggravation thereof. That the plaintiff suffered insult and indignity at the hands of the conductor, and was treated disrespectfully and indecorously by him under such circumstances as to occasion mental suffering, humiliation, wounded pride, and disgrace, there can be little doubt. At least the jury might have so found upon the evidence before them. This question was treated on the argument as a novel one, and as requiring the establishment of a new principle of law to enable the plaintiff to recover damages in excess of the amount retained by the defendant's conductor which rightfully belonged to her. In that we think counsel were at fault, and that the right to such a recovery is established beyond question, as will be seen by the authorities which we shall presently consider. The consideration of this general question involves two propositions. The first relates to the duties of carriers to their passengers, and the second to the rule of damages when there has been a breach of such duty. The relation between a carrier and its passenger is more than a mere contract relation, as it may exist in the absence of any contract whatsoever. Any person rightfully on the cars of a railroad company is entitled to protection by the carrier, and any breach of its duty in that respect is in the nature of a tort, and recovery may be had in an action of tort as well as for a breach of the contract. 2 Sedgwick on Damages, 637. In considering the duties of carriers to their passengers, we find that the elementary writ-

ers have often discussed this question, and that it has frequently been the subject of judicial consideration. Thus, in Booth on Street Railways, § 372, it is said: "The contract on the part of the company is to safely carry its passengers, and to compensate them for all unlawful and tortious injuries inflicted by its servants. It calls for safe carriage, for safe and respectful treatment from the carrier's servants, and for immunity from assaults by them, or by other persons, if it can be prevented by them. No matter what the motive is which incites the servant of the carrier to commit an improper act towards the passenger during the existence of the relation, the master is liable for the act and its natural and legitimate consequences. Hence it is responsible for the insulting conduct of its servants, which stops short of actual violence." In Hutchinson on Carriers, §§ 595, 596, the rule is stated as follows: "The passenger is entitled not only to every precaution which can be used by the carrier for his personal safety, but also to respectful treatment from him and his servants. From the moment the relation commences, as has been seen, the passenger is, in a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance. * * * The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully; and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger, but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence or wilful misconduct of the carrier's servant, the carrier is necessarily responsible. And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants, and can discharge them when he pleases, and it is but

reasonable that he should be responsible for the manner in which they execute their trust." In Thompson on Negligence, § 3186, the learned writer, after stating the foregoing rule, adds: "The carrier is liable absolutely, as an insurer, for the protection of the passenger against assaults and insults at the hands of his own servants, because he contracts to carry the passenger safely and to give him decent treatment en route. Hence, an unlawful assault or an insult to a passenger by his servant is a violation of his contract by the very person whom he has employed to carry it out. The intendment of the law is that he contracts absolutely to protect his passenger against the misconduct of his own servants whom he employs to execute the contract of carriage. The duty of the carrier to protect the passenger during the transit from the assaults and insults of his own servants being a duty of an absolute nature, the usual distinctions which attend the doctrine of *respondeat superior* cut little or no figure in the case." Again, in Schouler on Bailments, § 644, it is said: "Nor is it only good treatment from fellow passengers and from strangers coming upon the car, vessel, or vehicle that each passenger is entitled to, but he should be well treated by the passenger-carrier himself, and all whom such carrier employs in and about the vehicle in the course of the journey. If the general doctrine of master and servant may be said to apply here, it applies with a very strong bias against the master, even where the servant's acts appear to be aggressive, wanton, malicious, and, so to speak, such as one's strict contract of service or agency does not readily imply. Such is the general construction, so long as the offensive words and acts of a conductor, * * * or other such servant complained of, were said or committed in the usual line of duty, while, for instance, scrutinizing tickets and determining the right to travel, excluding offenders and trespassers, and enforcing, or pretending to enforce, the carrier's rules aboard the vehicle; and this whether the transportation of passengers be by land or water."

Having thus considered a portion of the elementary authorities relating to this question, we will now consider a few of the many decided cases relating to the same subject. In Chamberlain v. Chandler, 3 Mason, 242, 245, Fed. Cas. No. 2,575, Judge Story, who delivered the opinion of the court, in discussing the duties, relations, and responsibilities which arise between the carrier and passenger, said: "In respect to passengers, the case

of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere shiproom and personal existence on board, but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females it proceeds yet farther; it includes an implied stipulation against general obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror and cool malignancy of conduct to inflict torture upon susceptible minds. * * * It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. The law looks on them as unworthy of its cognizance. The master is at liberty to inflict the most severe mental sufferings in the most tyrannical manner, and yet, if he witholds a blow, the victim may be crushed by his unkindness. He commits nothing within the reach of civil jurisprudence. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case the contract of the passengers for the voyage is, in substance, violated; and the wrong is to be redressed as a cause of damage." In Knoxville Traction Company v. Lane, 103 Tenn. 376, it was held that an electric street railway company was liable in damages to a passenger for the injury to his feelings by the indecent and insulting language of its employé, upon the ground, not of tort or negligence, but of breach of its contract that obligates the carrier not only to transport the passenger but to guaranty him respectful and courteous treatment, and to protect him from violence and insult from strangers and from its own employés; that as to the latter, the obligation of its contract is absolute; and that it selects its agents to perform its contract, and the carrier, and not the passenger, must assume the responsibility for the acts and conduct of such agents. In Cole v. Atlanta & West Point R. R. Co., 102 Ga. 474, it was held that it was the unquestionable duty of a railroad com-

pany to protect a passenger against insult or injury from its conductor, and that the unprovoked use by a conductor to a passenger of opprobrious words and abusive language tending to humiliate the passenger or subject him to mortification gives to the latter a right of action against the company. In that case it was said: "The carrier's liability is not confined to assaults committed by its servants, but it extends also to insults, threats, and other disrespectful conduct." In Goddard v. Grand Trunk R. R. Co., 57 Me. 202, it was held that a common carrier of passengers is responsible for the misconduct of his servant towards a passenger. In that case Walton, J., delivering the opinion of the court, said: "The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and, if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. * * * He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible"—citing Howe v. Newmarch, 12 Allen, 55; Moore v. Railroad, 4 Gray, 465; Seymour v. Greenwood, 7 Hurl. & Nor. 354; Railroad v. Finney, 10 Wis. 388; Railroad v. Vandiver, 42 Pa. 365; Railroad v. Derby, 14 How. (U. S.) 468; Railway v. Hinds, 53 Pa. 512; Flint v. Transportation Co., 34 Conn. 554; Landreaux v. Bell, 5 La. [O. S.] 275; Railroad v. Blocher, 27 Md. 277. The decision in Southern Kansas R. R. Co. v. Hinsdale, 38 Kan. 507, was to the effect that where a conductor, in ejecting a person from a train, uses insulting or abusive language, such person may recover damages therefor on account of the injury to his feelings, but cannot, in an action for damages for his expulsion, also receive damages because the words used tended to bring him into ignominy and disgrace. So, in Craker v. Chicago & N. W. R. R. Co., 36 Wis. 657, it was held that a railroad company is bound to protect female passengers on its trains from all indecent approach or assault; and where a conductor on the company's train makes an assault the company is

liable for compensatory damages. In Bryan v. Chicago, R. I. & P. R. R. Co., 63 Iowa, 464, it was also held that an action by a passenger on the defendant's road would lie for injuries sustained from insolent, abusive, and offensive words spoken to her by the conductor. In McGinness v. Mo. Pac. Ry. Co., 21 Mo. App. 399, the decision of the United States court in Chamberlain v. Chandler was followed, and the discussion of the court in that case closely followed the discussion by Judge Story. In Spohn v. Missouri Pacific Railway Co., 87 Mo. 74, the court held that the company was liable to its passengers for any violence or insult from others while the relation of carrier and passenger existed. See, also, Malecek v. Tower Grove & Lafayette R. R. Co., 57 Mo. 17; Lou. & Nash. R. R. Co. v. Ballard, 85 Ky. 307; Winnegar's Administrator v. Cent. Pass. Ry. Co., 85 Ky. 547; Sherley v. Billings, 8 Bush, 147; Eads v. Metropolitan St. Ry. Co., 43 Mo. App. 536; Block v. Bannerman, 10 La. Ann. 1; and Coppin v. Braithwaite, 8 Jurist, pt. 1, 875. The duties arising between a carrier and passenger have been several times discussed in this state, as in Stewart v. Brooklyn & Crosstown R. R. Co., 90 N. Y. 588, 590, where it was said: "By the defendant's contract with the plaintiff, it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger. * * * 'The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and, if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust.'" The court then quoted with approval the decision in Nieto v. Clark, 1 Cliff. 145, 149, Fed. Cas. No. 10,262, where it was said: "In respect to female passengers, the contract proceeds yet further, and includes an implied stipulation that they shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. * * * A common carrier undertakes absolutely to protect his passengers against the misconduct of their own servants engaged in executing the contract." Subsequently, in Dwinelle v. N. Y. C. & H. R. R. R. Co., 120 N. Y. 117, 24, the same doctrine was held, and the foregoing portion of the opinion in the Stewart Case was

quoted and reaffirmed by this court. It was then added: "These and numerous other cases hold that, no matter what the motive is which incites the servant of the carrier to commit an unlawful or improper act toward the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences." Again, in Palmeri v. Manhattan R. Co., 133 N. Y. 261, it was held that the corporation is liable for the acts of injury and insult by an employee, although in departure from the authority conferred or implied, if they occur in the course of the employment. In that case the employee alleged that the plaintiff was a counterfeiter and a common prostitute, placed his hand upon her, and detained her for a while, but let her go without having her arrested. The action was to recover damages for unlawful imprisonment, accompanied by the words alleged to have been spoken. This court held she was entitled to recover. The judge then said: "Though injury and insult are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed."

The foregoing authorities render it manifest that the defendant was not only liable to the plaintiff for the money wrongfully retained by its conductor, but also for any injury she suffered from the insulting and abusive language and treatment received at his hands.

This brings us to the consideration of the elements of damages in such a case, and what may be considered in determining their amount. Among the elements of compensatory damages for such an injury are the humiliation and injury to her feelings which the plaintiff suffered by reason of the insulting and abusive language and treatment she received, not, however, including any injury to her character resulting therefrom. She was entitled to recover only such compensatory damages as she sustained by reason of the humiliation and injury to her feelings, not including punitive or exemplary damages. "Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary, damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The *quantum* of this suffering may not, and generally does not, depend at all upon the mental condition of the carrier's servant, whether he acted hon-

estly or dishonestly, with or without malice. But, whatever view is taken of this question, it is clear that, where the expulsion is made in consequence of a mistake of another agent of the carrier—as in a case where a previous conductor erroneously punched the transfer check which he gave to the passenger so as to read 2:40 p. m. instead of 3:40 p. m., and, in addition to this, the expulsion was accompanied by insulting remarks made to the passenger in the presence of others, damages may be given, founded on the humiliation and injury to the feelings of the passenger." Thompson on Negligence, § 3288. The same doctrine is laid down in Joyce on Damages, § 354. In Hamilton v. Third Ave. R. R. Co., 53 N. Y. 25, where a passenger was ejected by the conductor, who honestly supposed the fare had not been paid, and no unnecessary force was used, it was held that the act of the defendant's servant, being unlawful, rendered the defendant liable for compensatory damages, including compensation for loss of time, the fare upon another car, and a suitable recompense for the injury done to the plaintiff's feelings. In Eddy v. Syracuse Rapid Transit R. Co., 50 App. Div. 109, it was held that, where the plaintiff entered a car believing that his transfer was valid, and was not negligent in failing to discover that it had been punched erroneously, he was there lawfully, and entitled to recover compensatory damages, including the indignity, humiliation, and injury to his feelings by the remarks of the conductor and his wrongful ejection from the car. In Miller v. King, 84 Hun, 308, 310, 32 N. Y. Supp. 332, it was held that the conductor had no right to eject the plaintiff; that his action in doing so was unlawful, and that the plaintiff was entitled to damages for the indignity and humiliation suffered thereby. See, also, Sedgwick on Damages, § 865. In Jacobs v. Third Ave. R. R. Co., 71 App. Div. 199, 202, it was held that the plaintiff was entitled to recover compensatory damages, which embraced loss of time, the amount which the plaintiff was obliged to pay for passage upon another car, and injury done to his feelings by reason of the indignity which he wrongfully suffered. The same doctrine was held in Ray v. Cortland & Homer Traction Co., 19 App. Div. 530. See, also, Pullman's Palace Car Co. v. King, 99 Fed. 381. In Shepard v. Chicago, R. I. & P. R. R. Co., 77 Iowa, 54, the court charged the jury: "When a passenger is wrongfully compelled to leave a train and suffer insult and abuse, the law does not exactly measure his damages, but it au-

thorizes the jury to consider the injured feelings of the party, the indignity endured, the humiliation, wounded pride, mental suffering, and the like, and to allow such sum as the jury may say is right;" and it was held that his instruction was not subject to the objection that it authorized an allowance of exemplary damages, because damages may properly be allowed for mental suffering caused by indignity and outrage, and such damages are compensatory, and not exemplary. In Craker v. Chicago & N. W. R. R. Co., 36 Wis. 657, it was held that in actions for personal torts the compensatory damages which may be recovered of the principal for the agent's act include not merely the plaintiff's pecuniary loss, but also compensation for mental suffering, and that in awarding compensatory damages in such cases no distinction is to be made between other forms of mental suffering and that which consists in a sense of wrong or insult arising from an act really or apparently dictated by a spirit of willful injustice, or by a deliberate intention to vex, degrade, or insult. In Cole v. Atlanta & West Point R. R. Co., 102 Ga. 474, it was held that, even where there was no actual assault, but the company has failed in its duty to protect its passenger from insult, abuse, and ill treatment, the plaintiff is entitled to recover damages for the pain and mortification of being publicly denounced as a deadbeat, and in that case it was said: "While this was a wanton act of commission by a servant of the company, it was also a negligent omission on the part of the servants to perform towards the plaintiff a duty imposed by law upon their master." Humiliation and indignity are elements of actual damages, and these may arise from a sense of injury and outraged rights in being ejected from a railroad train without regard to the manner in which the ejection was effected, though only done through mistake. Louisville & Nashville R. R. Co. v. Hine, 121 Ala. 234. Where unnecessary violence was used in ejecting a passenger from a train, he is entitled to damages for the direct consequences of the wrong, including as well physical pain as mental suffering resulting from accompanying insults, if any. Texas Pacific R. R. Co. v. James, 82 Tex. 306. A conductor of a railroad company represents the company in the discharge of his functions, and being in the line of his duty in collecting the fare or taking up tickets, the corporation is liable for any abuse of his authority, whether of omission or commission. In that case the court charged that "in estimating damages they might take into con-

sideration the indignity, insult, and injury to plaintiff's feelings by being publicly expelled," and it was held proper. S. K. R. R. Co. v. Rice, 38 Kan. 398. Damages may be properly allowed for mental suffering caused by indignity and outrage, whether connected with physical suffering or not; and such damages are compensatory, and not exemplary. Shepard v. Chicago, R. I. & P. R. R. Co., 77 Iowa, 54. Where the plaintiff, holding a ticket, was wrongfully threatened with expulsion from the cars, charged with attempting to ride without paying therefor, and paid his fare rather than to be ejected, it was held that he was entitled to recover damages for the humiliation suffered and indignity done him by such action on the part of the conductor. Penn. Co. v. Bray, 125 Ind. 229. Where a passenger is expelled from a train, and without fault on his part, he may recover more than nominal damages, although he has suffered no pecuniary loss or received actual injury to the person by reason of such expulsion; and the jury, in estimating the damages, may consider not only the annoyance, vexation, delay, and risk to which the person was subjected, but also the indignity done him by the mere fact of his expulsion. Chicago & Alton R. R. Co. v. Flagg, 43 Ill. 364. A person wrongfully ejected from a train is entitled to recover such damages as he may have sustained by the delay occasioned by the expulsion, and all the additional expenses necessarily incurred thereby, as well as reasonable damages for the indignity to which he was subjected in being expelled from the train. Penn. R. R. Co. v. Connell, 127 Ill. 419. Where there was a wrongful expulsion of a passenger from the car, although unaccompanied by any physical force or violence, it is actionable, and in such a case the sense of wrong suffered and the feeling of humiliation and disgrace engendered is an actual damage for which the injured party may recover compensation, such damages being compensatory, and not exemplary. Willson v. Northern Pacific R. R. Co., 5 Wash. 621. See, also, G. C. &. S. F. R. R. Co. v. Copeland, 17 Tex. Civ. App. 55; Railroad Co. v. Goben, 15 Ind. App. 123; Cooper v. Mullins, 30 Ga. 146; Railroad Co. v. Deloney, 65 Ark. 177; Railroad Company v. Dickerson, 4 Kan. App. 345.

After this somewhat extended review of the authorities bearing upon the subject, we are led irresistibly to the conclusion that the defendant is liable for the insulting and abusive treatment the plaintiff received at the hands of its servant, that she is entitled to recover compensatory damages for the humiliation

and injury to her feelings occasioned thereby, and that the trial court erred in directing a verdict for the plaintiff for 20 cents only, and in refusing to submit the case to the jury.

The judgments of the Appellate Division and trial court should be reversed, and a new trial granted, with costs to abide the event.

GRAY, J. (dissenting). I dissent, because I think it is extending unduly the doctrine of a common carrier's liability in making it answerable in damages for the slanderous words spoken by one of its agents.

BARTLETT, HAIGHT, and CULLEN, J. J., concur with MARTIN, J. PARKER, C. J., and O'BRIEN, J., concur with GRAY, J.

Judgments reversed, etc.

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5. *Contract for Board and Rooms.*

WILKINSON *v.* DAVIES.

New York, 1894. 146 N. Y. 25.

HAIGHT, J. This action was brought to recover for board and lodging furnished by the plaintiff to the defendant's intestate, Henry E. Davies. It appears that the plaintiff let to Davies rooms on the second floor of her residence, No. 34 West Fifty-First street, in the city of New York, consisting of a parlor, two bedrooms, and connecting bath, for the occupancy of himself and family, consisting of a wife and son, from the 5th day of November, 1890, to the 1st day of June, 1891, with table board, for the sum of $70 per week, with no deduction in case of absence; that Davies entered into possession of the premises at the time mentioned, and continued until Thanksgiving Day, at which time he abandoned the premises and went away. The premises remained vacant until the 1st of January, at which time the plaintiff relet them to four people, for $75 per week. Davies paid for the time that he occupied the premises, and no longer. A verdict was directed in favor of the plaintiff for the time that the premises remained vacant, at $70 per week, the contract price.

The appellant contends that an improper measure of damages was adopted, and that all that the plaintiff could properly recover under the circumstances were the profits she would have made had Davies carried out his contract. This would, doubtless,

be the rule as to the measure of damages were it not for the provisions of the contract that no deduction should be made in case of absence. Here we have an express provision fixing the term, the amount to be paid per week, without deduction, etc. Under such a contract, we think the price agreed upon becomes the proper measure of damages. In this connection it is further contended that the provision, "with no deduction in case of absence," should be construed to mean that there should be no deduction so long as Davies kept his agreement, but this construction would permit Davies to avoid the provisions of the contract by his own breach thereof, and such it does not appear to us was the intention of the parties. But suppose we should so construe it. We find no evidence in the record that Davies ever terminated the contract, or that he gave notice that he would no longer occupy the premises. He left and went away, it is true, but he might have returned the next day, the next week, or even the next month, and continued his occupancy of the premises; and the plaintiff in the meantime was required to keep his rooms ready for him. Under such circumstances, it would appear to be unjust to deprive the plaintiff of the benefit of her contract.

It further appears that upon the trial the plaintiff offered to show her profits from the people that occupied the premises after the 1st of January, and as to whether they were greater or less than that which she would have derived from Davies had he continued to occupy them. This was objected to by the defendant, without stating any grounds for the objection, and the same was sustained. She further attempted to show what it would have cost her per week to provide table board for Davies and his family. This was also objected to by the defendant, and the evidence was excluded. Had this evidence been received, it might have appeared that the plaintiff's profits from the four boarders after the 1st of January were the same as they would have been had Davies and his family continued to occupy the premises, and that the planitiff's expenses in providing table board for Davies and his family were $15 or $20 per week, for which a deduction might have been made from the contract price of $70 per week. But the defendant interposed an objection to this evidence, and caused it to be excluded. After so excluding it, we think he is in no position to insist that the plaintiff's recovery be limited to her profits. As we have seen, no ground was stated for the objections to the evidence. The complaint was in due form to re-

cover for board and lodging. If, upon the trial, the plaintiff consented to forego her claim to the contract price of $70 per week, without deduction in case of absence, and permit a deduction therefrom of her costs for table board, the defendant ought not to complain, or be permitted to defeat her right to recover, because the complaint did not demand that particular measure of relief. The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

VI. DAMAGES IN ACTIONS FOR WRONGS.

1. *Negligence.*

RICHMOND GAS CO. *v.* BAKER.

Indiana, 1897. 146 Ind. 600.

The plaintiff brought this action to recover damages for personal injuries caused by an explosion of artificial gas in her home, caused by the negligence of the defendant company. A verdict of $4,600 was recovered.

HOWARD, J. * * * Upon the subject of damages the court gave to the jury two instructions, the first of which is admitted to be correct, and the second of which is complained of by appellants as being erroneous. The two instructions are as follows:

"No. 15. If you find a verdict for the plaintiff, you should award her a sum sufficient to fairly compensate her for all damages, if any, that it is shown, by a fair preponderance of the evidence, she has sustained. In estimating such damages, you should consider the nature and extent of her physical injuries, if any, whether permanent or otherwise; the effect produced thereby, and the probable effect that such injuries will directly produce, if any, upon her general health, and all physical pain and suffering occasioned thereby; expenses incurred for medical attention, if any, shown by the evidence. And if you find from the evidence that she has sustained any permanent disability, having considered the nature of the same, you may award her such prospective damages on account thereof as in your opinion the evidence may warrant you in believing she will sustain, if any, as the direct result thereof in the future. And you have the right, in fixing her damages, to consider her present age, and the probable duration of her life.

"No. 16. If, as a direct result of the injuries, if any, received by the plaintiff, her expectancy of life has been shortened, this circumstance may be taken into consideration by the jury, should they find a verdict in her favor, in estimating the dam-

ages, if any, that they may award to her; and on this point the jury may consider all facts, proved by a fair preponderance of the evidence, as to the plaintiff's physical condition, health, vigor, activity, and the daily work done by her, prior to the said explosion."

The first charge above given is full and complete, covering every element of damage suggested by the evidence, unless it should be damages for the shortening of life, as referred to in the second charge. It is as to this question that counsel differ. Counsel for appellant contend that instruction No. 16 is erroneous, for the reason that this is a common-law action, and the common law does not admit of compensation in money for the taking of human life, or the shortening of its duration. * * * None of the cases cited by the appellee, as we believe, sustain the contention of counsel. In general these cases reach to this that in an action for injury by the wrong of another the actual condition of the injured person, as caused by the accident, may be considered for the purpose of determining the amount of damages, present and prospective, which should be awarded. And, if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered, in determining the extent of the injury, the consequent disability to make a living, and the bodily and mental suffering which will result. This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life. And, if any one else could maintain an action for the death of the injured person, it must be because the person bringing such action would be able to show pecuniary loss or damage to himself by reason of the death of such other person. Of that nature are various stautory actions authorized to be brought by, or for the benefit of, persons regarded as having a pecuniary interest in the lives of others. * * *

The judgment is reversed, with instructions to grant a new trial.

HUBBARD *v.* N. Y., N. H. & H. R. CO.

Connecticut, 1898. 70 Conn. 563.

Action to recover damages for destruction of an ice house by fire communicated by defendant's locomotive engine.

ANDREWS, C. J. There is error in the plaintiff's appeal. In any case where it is established that a party is entitled to recover damages for an injury done to his property without malice, the quantum of damages is to be computed as of the day the injury was done. In this case, it being conceded by the default that the plaintiff was entitled to have some amount of damages, the only question on which the court could decide was, how much? In respect to the ice this question could be answered by ascertaining the number of tons there were in the houses on the day the fire took place, and its market price on that day. The court found the price to be, on the day of the fire, 80 cents per ton. But, in ascertaining the number of tons for which the plaintiff is to be paid, the court, instead of taking the number of tons then in the houses, has taken only the number of tons which it estimated would remain on hand at the end of the next summer. This is error. The plaintiff is entitled to be paid for all the ice then in the ice houses,—less what was saved, if any,—at its then market price. Parrott v. Railroad Co., 47 Conn. 575; Regan v. Railroad Co., 60 Conn. 143; Hurd v. Hubbell, 26 Conn. 389; Cook v. Loomis, Id. 483; Oviatt v. Pond, 29 Conn. 479; 2 Sedg. Meas. Dam. 368. The defendant, having destroyed the plaintiff's property on a certain day, cannot justly be exempted from payment by alleging or even showing that, if it had not destroyed the property, the plaintiff subsequently would have lost it in some other way. * * *

There is error on the plaintiff's appeal, and a new trial is granted. There is also error in the order expunging the motion filed by the defendant. The order is reversed. The motion should be restored to, and be made a part of, the files of the case. The other judges concurred.

DONAHUE *v.* KEYSTONE GAS CO.

New York, 1904. 90 App. Div. 386.

STOVER, J. This is an action brought to recover damages for injury to premises of plaintiff through the destruction of orna-

mental shade trees in front of his premises on the west side of Union street in the city of Olean, by reason of leakage of gas from the mains of defendant, which were laid in the street in front of plaintiff's premises, and near the trees which were destroyed. * * *

Some question has been made as to the rule of damages which was adopted in this case, but we think the correct rule was stated by the trial judge, viz., the difference between the value of the property with the growing trees and its value with the trees removed. It is the value of the right of which the plaintiff has been deprived, namely, the enjoyment of the premises with the trees, and to the extent that he has been deprived he is entitled to recover. If the value of his property has been depreciated by the wrongful act of the defendant he is entitled to recover to the extent that it has been depreciated.

The rule of damages has been laid down in many adjudicated cases that where property has been interfered with and has depreciated in value and without the destruction of the fee, the owner is entitled to recover the difference in the value of the premises before and after the interference.

Reference has been made to the case of Halleran v. Bell Telephone Co. (64 App. Div. 41), but we do not deem the doctrine of that case inconsistent with the views above expressed. The basis of that decision was the failure of evidence showing any interference with the enjoyment of the abutter's premises, and the opinion being based upon the fact that his right was not, to any extent, interfered with, the finding of fact there being "That the telephone poles do not interfere in any degree with any right which the plaintiff has as an abutting owner."

We find no error and the judgment and order should be affirmed.

All concur.

Affirmed in 181 New York 317.

KRONOLD *v.* CITY OF NEW YORK.

New York, 1906. 186 N. Y. 40.

WERNER, J. This action was brought to recover damages for personal injuries sustained by the plaintiff and alleged to have been caused by the negligent failure of the defendant to keep in proper repair a crosswalk at the intersection of Elm and Walker

streets in the borough of Manhattan. For the purposes of this discussion we may assume, although we do not decide, that the defendant's alleged negligence and the plaintiff's freedom from contributory negligence were sufficiently established to present questions of fact to be disposed of by a jury, and we shall confine our discussion to the single question whether the learned trial judge properly refused to submit to the jury the plaintiff's alleged loss of earnings or income as an element of the damages which should be awarded to him if he is entitled to a verdict.

At the close of the evidence the learned trial judge announced that he would not submit to the jury the plaintiff's claim for loss of income, because it appeared from his own testimony that he had $1,000 of capital invested in his business, and there was no evidence to show how much of his income had been derived from his invested capital and how much from his personal efforts. When this ruling had been made, plaintiff's counsel asked permission to put the plaintiff on the stand for the purpose of interrogating him as to the reasonable value of his services, or what compensation similar services would command. This request was refused, and plaintiff's counsel took an exception. The case was then submitted to the jury under a charge in which the income or earnings of the plaintiff from his personal efforts was distinctly excluded from consideration as an element of any damages which might be awarded to him. At the conclusion of the main charge plaintiff's counsel requested the court to instruct the jury that it was for them to consider "the nature of the business in which the plaintiff was engaged, its extent, and the particular part therein transacted by him," and the court replied: "I charge that, with the statement that you are not to take into consideration his earnings as testified to by him, for the reason that he stated that he had capital invested." To this modification of his request the plaintiff's counsel excepted, and later he excepted generally to that portion of the charge in which the jury were instructed to disregard the testimony of the plaintiff as to his earnings in his business. These exceptions, when considered in the light of the evidence, are sufficiently definite, we think, to present for our review the question whether the rulings of the court above adverted to present legal error or not, and a brief synopsis of the plaintiff's evidence on this subject will serve to fix the point of view from which that question should be considered.

Prior to the accident the plaintiff had been engaged in the business of selling Swiss embroideries. He took orders from shirt waist manufacturers, Vantine and others who dealt in such articles. These sales were made from designs or drawings procured from sample embroideries. No considerable stock of these embroideries seems to have been carried by the plaintiff, and the capital which he had invested in his business was approximately $1,000. His office expenses, which included rent and the wages of an office boy, did not exceed $600 a year. His net income was about $3,000 a year, and it is fairly to be inferred from his testimony that this was derived chiefly from his personal efforts as a canvasser or salesman, for he stated: "I really made my living only with my legs and maybe a little head also, but most my legs. Of course, I have been laid down; then I had to stop. I did not employ any salesmen or drummers or anythink like that. I was myself a salesman and a drummer; out of town sometimes." When we add to this brief, but comprehensive, statement the suggestion that the amount of the plaintiff's income as compared with the so-called capital invested is, of itself, an almost conclusive argument against the theory that the plaintiff was engaged in a business which yielded profits from capital invested, it will readily be seen that this case should be classed as one involving the investment of an insignificant capital as a mere incident or vehicle to the performance of services almost, if not quite, purely personal in their nature. We so regard the case on principle, but this view is also well sustained by authority. In Pill v. Brooklyn Heights R. R. Co., 6 Misc. Rep. 267, affirmed 148 N. Y. 747, where the plaintiff was a custom corset maker who maintained a workshop and employed two girls to help her, it was held competent to prove loss of earnings resulting from the injuries on account of which the suit was brought. In Ehrgott v. Mayor, etc., of New York, 96 N. Y. 264, also an action to recover damages for personal injuries, the plaintiff was a book canvasser and was permitted to show his earnings prior to his injuries. There the court, speaking through the late Earl, J., illustrated the plaintiff's position by likening it, so far as personal earnings were concerned, to the occupations of the lawyer, the physician, and the dentist, whose earnings are the result of their professional skill without capital invested. The lawyer has to have books, and, if he is busy enough, he employs clerks to assist him. The physician puts money into instruments,

books, and medicines. The dentist invests in gold leaf, artificial teeth, and tools. And yet their incomes, which, to some extent, at least, are the product of such investments and expenditures, are classified as personal earnings, the loss of which must be considered as an element of damages in actions for personal injuries. To the same effect are Simonin v. N. Y., L. E. & W. R. R. Co., 36 Hun, 214, where the plaintiff was a teacher of French; Nash v. Sharpe, 19 Hun, 365, where the plaintiff was a dentist; Lynch v. Brooklyn City R. R. Co. (Sup.) 5 N. Y. Supp. 311, affirmed 123 N. Y. 657, the case of a midwife; Thomas v. Union Ry. Co., 18 App. Div. 185, where the plaintiff performed services as gauger for a copartnership of which he was a member; Waldie v. Brooklyn Heights R. R. Co., 78 App. Div. 557, the case of a licensed pilot, and numerous other cases involving a variety of occupations, in which the element of personal earnings has been held to predominate over a small and purely incidental or supplemental investment of capital.

The cases above cited, as well as the case at bar, are clearly distinguishable, we think, from Masterson v. Village of Mt. Vernon, 58 N. Y. 391, Marks v. Long Island R. R. Co., 14 Daly, 61, Boston & Albany R. R. Co. v. O'Reilly, 158 U. S. 334, and other cases relied upon by counsel for the respondent and the courts below, because these latter decisions are all based upon facts which disclose such a preponderance of the business element over the personal equation, or such an admixture of the two, that the question of personal earnings could not be safely or properly segregated from returns upon capital invested, in considering the damages to which the several plaintiffs claimed to be entitled.

In the case at bar there was not only evidence which tended properly to show that the plaintiff had sustained damages through loss of personal services, but competent evidence bearing upon the same subject was excluded, and we think the refusal of the learned trial court to submit to the jury the former, as well as its ruling excluding the latter, constitutes legal error, which entitles the plaintiff to a new trial. In this view of the case we deem it unnecessary to discuss other questions that may not be again presented.

The judgment below should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and VANN, WILLARD BARTLETT, HISCOCK, and CHASE, JJ., concur. O'BRIEN, J., absent.

Judgment reversed, etc.

BONDY *v.* N. Y. CITY R. R. CO.

New York, 1907. 107 N. Y. Supp. 31.

ERLANGER, J. A car operated by the defendant collided with the plaintiff's automobile, and this action was brought to recover the damages sustained by reason of the collision. Upon the question of the negligence of the defendant and freedom from negligence of the plaintiff there was a conflict of evidence. The court below found in favor of the plaintiff. The appellant urges that the judgment is against the weight of evidence. An examination of the record does not support such contention. The judgment was rendered for the sum of $500, the extreme limit for which the court had jurisdiction. The items of damage proven were $148 for repairs to the machine and the sum of $69.70 for a new tire. The difference between the total of these two items and the amount of the judgment is for the usable or rental value of the automobile, which a witness testified was $200 per week for a period of three weeks while the same was being repaired. The plaintiff testified that he was the owner of the machine, and that every time it was taken out it was used for "healthy purposes and pleasure." The proof as to rental value was objected to, and a motion was made to strike it out as irrelevant, immaterial, and not the proper measure of damage, which motion was denied.

It is urged upon this appeal that such damages are not legally recoverable upon the facts established in this case. That the use of an automobile may, upon being shown to have been used for the purpose of business or as a source of profit, have a marketable value, or a value capable of being estimated without indulging in mere conjecture, is undoubted; but nothing of the kind was proved in the case at bar. The plaintiff, so far as appears, did not incur any expense in hiring a substitute for the three weeks his machine was in the repair shop; nor is there any evidence that it was a source of profit or income to him. The evidence as to the rental value was limited to this particular machine, and it was not shown to be an "article in constant and daily use, whose usable value, being known and readily ascertained,

constitutes a proper element of damages." Volkmar v. Third Ave. R. R. Co., 28 Misc. Rep. 141, 58 N. Y. Supp. 1021. None of the cases cited by respondent upholds his contention. In those cases the actual reasonable outlay for the rent of articles in lieu of the injured articles was shown, as, for example, in Wellman v. Minor, 19 Misc. Rep. 644, 44 N. Y. Supp. 417, the plaintiff proved the amount paid for a carriage in his business while his damaged one was undergoing repairs, and in Moore v. Met. St. Ry. Co., 84 App. Div. 613, 82 N. Y. Supp. 778, it was established that the wagon injured was used in plaintiff's business. The circumstances disclosed by the testimony in the case at bar are somewhat similar to those in Foley v. 42d St., etc., Ry. Co., 52 Misc. Rep. 183, 101 N. Y. Supp. 780, where this court held the plaintiff was not entitled to recover for alleged damages upon such proof.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event, unless plaintiff will stipulate within five days to reduce the judgment to $217.70 and appropriate costs in the court below, in which event the judgment, as so modified, will be affirmed, without costs of this appeal.

All concur.

"Where personal injuries result proximately from negligence or other tort, the wrongdoer is liable for the damages actually sustained, although they are increased by a tendency to disease on the part of the person injured." McNamara v. Village of Clintonville, 62 Wis. 207. So a judgment of $5,000 was sustained against a city for injuries to plaintiff from a defective sidewalk, although plaintiff's physician did not employ up-to-date remedies. Selleck v. Janesville, 100 Wis. 157.

For a case where act of God, an extraordinary flood, cooperates with negligence to produce injury, see Helbling v. Cemetery Co., 201 Pa. 171.

Where a widowed mother sues for the loss of services of her minor daughter the question is "practically a business and commercial question only, and the elements of affection and sentiment have no place therein." A judgment for $9,500 was set aside as excessive. McGarr v. Worsted Mills, 24 R. I. 447.

There can be no recovery for shock and fright caused by negligent explosion of dynamite in a highway so that plaintiff's husband died in two weeks. Huston v. Borough of Freemansburgh, 212 Pa. 548.

"Where a tort has been committed, and injury may reasonably be anticipated, the wrongdoer is liable for the proximate results of that injury, although the consequences are more serious than they would have been, had the injured person been in perfect health." Watson, Damages, Sec. 195. Ross. v. G. N. Ry., 101 Minn. 122.

Damages in case of negligence can be awarded for nursing, medicine, and doctor's bills. Johnson v. St. Paul & W. Coal Co., 131 Wis. 627.

For rule as to measure of damages in an action against an attorney at law for negligence, see Vooth v. McEachen, 181 N. Y. 28.

Where plaintiff's building was injured by water leaking from a canal owing to the negligence of the State, claimant may recover his expenses of restoration and loss of rental during the period of repairs. Slavin v. State of N. Y., 152 N. Y. 45; Connor v. State of New York, 152 N. Y. 49.

Where property was injured by coal dust the measure of damages is the cost of restoration. If the cost exceeds the value, in that event the value is the measure of damages; besides this the actual loss in rentals can be recovered. Harvey v. Susquehanna Coal Co., 201 Pa. 68.

See, for the rule of damages in cases of personal injuries through negligence, Sullivan v. Boston El. R. R. 71 N. E. Rep. 90; Savage v. Chicago R. Co., 238 Ill. 392; Yerkes v. N. P. R. R., 112 Wis. 184; L. and N. R. R. v. Mount. 123 Ken. 593; Platz v. McKean, 178 Pa. 601; Brooks v. Rochester Railway Co., 156 N. Y. 244; Wineberg v. Du Bois, 209 Pa. 430.

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(1) *Actions Against Common Carriers.*

DENNY *v.* NEW YORK CENTRAL RAILROAD.

Massachusetts, 1859. 13 Gray, 481.

Action of tort, for damages to wool, delivered to defendant as a common carrier, to be transported from the Suspension Bridge at Niagara Falls to Albany.

MERRICK, J. This action is brought to recover compensation for damages alleged to have been sustained by the plaintiff in consequence of an injury to a quantity of his wool delivered to the defendants to be transported for him from Suspension Bridge to Albany. It appears from the report that the wool, directed to Boston, was received by them at the former, and carried to the latter place, and was there safely deposited in their freight depot. But it was not transported seasonably nor with reasonable despatch. By their failure to exercise the degree of care and diligence required of them by law, it was detained six days at Syracuse, and consequently arrived at Albany so many days later than it should regularly have been there. Whilst it was lying in the defendant's freight depot in that city, it was submerged by a sudden and violent flood in the Hudson River. This rise of the water caused the alleged injury to the wool.

Upon the evidence adduced by the parties at the trial, three

questions of fact were submitted to the determination of the jury. It is necessary now to advert only to the first of those questions; for the finding of the jury in relation to the second was in favor of the defendants, and the verdict in relation to the third has on their motion been already set aside as having been rendered against the weight of evidence in the case.

In looking at the terms and language in which the action of the jury in reference to the first of these questions is expressed, it would perhaps, at first sight, seem that they had passed upon and determined the precise point in issue between the parties, namely, whether the wool was injured by reason of an omission on the part of the defendants to exercise the care and diligence in the transportation of the wool, which the law required of them as common carriers. If this were so, it would have been a final and conclusive determination. But upon a closer scrutiny of the statements in the report, it appears that the jury, by their answer to the question submitted to them, intended only to affirm, that the defendants failed to exercise due care and diligence in the prompt and seasonable transportation of the wool, and that by reason of this failure and the consequent detention of the wool at Syracuse, it was injured by the rise of water in the Hudson, and thereby sustained damage to which it would not have been exposed if it had arrived at Albany as soon as it should have done, because in that event it would have been taken away from the defendants' freight depot, and carried forward to Boston before the occurrence of the flood. And it was upon this ground that the verdict was rendered for the plaintiff. This was so considered by both parties in their arguments upon the questions of law arising upon the report.

It is therefore now to be determined by the court, whether the defendants are, by reason and in consequence of their negligence in the prompt and seasonable transportation of the wool, responsible for the injury which it sustained after it was safely deposited in their depot at Albany. And we think it is very plain that, upon the well-settled principles of law applicable to the subject, they are not.

It is said to be an ancient and universal rule resting upon obvious reason and justice, that a wrongdoer shall be held responsible only for the proximate and not for the remote consequences of his actions. 2 Parsons on Con. 456. The rule is not limited to cases in which special damages arise; but is applicable

to every case in which damage results from a contract violated or an injurious act committed. 2 Greenl. Ev. §256. 2 Parsons on Con. 457. And the liabilities of common carriers, like persons in other occupations and pursuits, are regulated and governed by it. Story on Bailments, 586. Angell on Carriers, 201. Morrison v. Davis, 20 Penn. State R. 171.

In the last named case, it is said that there is nothing in the policy of the law relating to common carriers, that calls for any different rule, as to consequential damages, to be applied to them. In that case may be found not only a clear and satisfactory statement of the law upon the subject, but a significant illustration of the rule which the decision recognizes and affirms. It was an action against the defendants, as common carriers upon the Pennsylvania Canal. It appeared that their canal boat, in which the plaintiff's goods were carried, was wrecked below Piper's Dam, by reason of an extraordinary flood; that the boat started on its voyage with a lame horse, and by reason thereof great delay was occasioned in the transportation of the goods; and that, had it not been for this, the boat would have passed the point where the accident occurred, before the flood came, and would have arrived in time and safety at its destination. The plaintiff insisted that, inasmuch as the negligence of the defendants in using a lame horse for the voyage occasioned the loss, they were therefore liable for it. But the court, assuming that the flood was the proximate cause of the disaster, held, that the lameness of the horse, by reason of which the boat, in consequence of his inability thereby to carry it forward with the usual and ordinary speed, was exposed to the influence and dangers of the flood, was too remote to make the defendants responsible for the goods which were lost in the wreck. It was only, in connection with other incidents, a cause of the final, direct, and proximate cause by which the damages sought to be recovered were immediately occasioned.

There is so great a resemblance between the circumstances upon which the determination in that case was made, and those upon which the question under consideration in this arises, that the decision in both ought to be the same. In this case the defendants failed to exercise due care and diligence, in not being possessed of a sufficient number of efficient working engines to transport the plaintiff's wool with the usual ordinary and reasonable speed. The consequence of this failure on their part

was that the wool was detained six days at Syracuse. This was the full and entire effect of their negligence, and for this they are clearly responsible. But in all that occurred afterwards there was no failure in the performance of their duty. There was no delay and no negligence in any part of the transportation between Syracuse and Albany, and upon reaching the latter place the wool was safely and properly stored in their freight depot. It was their duty to make this disposition of it. They had then reached the terminus of their road; the carriage of the goods was then complete; and the duty only remained of making delivery. The deposit of the wool in the depot was the only delivery which they were required to make; and having made that, their liabilities as carriers thenceforward ceased. It was there to be received by the owner, or taken up by the proprietors of the railroad next in course of the route to Boston. Norway Plains Co. v. Boston & Maine Railroad, 1 Gray, 263. Nutting v. Connecticut River Railroad, 1 Gray, 502. The rise of waters in the Hudson, which did the mischief to the wool, occurred at a period subsequent to this, and consequently was the direct and proximate cause to which that mischief is to be attributed. The negligence of the defendants was remote; it had ceased to operate as an active, efficient, and prevailing cause as soon as the wool had been carried on beyond Syracuse, and cannot therefore subject them to responsibility for an injury to the plaintiff's property, resulting from a subsequent inevitable accident which was the proximate cause by which it was produced. It is to the latter only to which the loss sustained by him is attributable.

It follows from these considerations, that the verdict in the plaintiff's behalf must be set aside, and a new trial be had; in which he will recover such damages as he proves were the direct consequence of the negligence of which the defendants may be shown to have been guilty.

New trial ordered.

GREEN-WHEELER SHOE CO. *v.* CHICAGO, R. I. & P. Ry. CO.

Iowa, 1906. 130 Iowa, 123.

Action to recover the value of two parcels of goods delivered by plaintiff to defendant at Ft. Dodge, Iowa, one parcel to go to Booneville, Mo., and the other to Chanute, Kan., one of which it

is alleged was lost and the other damaged by defendant's negligence. The case was tried on an agreed statement of facts and judgment was rendered for defendant. Plaintiff appeals.

McCLAIN, C. J. In the agreed statement on which the case was tried without other evidence being introduced, it is stipulated that the defendant was guilty of negligent delay in the forwarding of the goods of plaintiff from Ft. Dodge to Kansas City, where they were lost or injured on May 30, 1903, by a flood which was so unusual and extraordinary as to constitute an act of God, and that if there had been no such negligent delay the goods would not have been caught in the flood referred to or damaged thereby.

We have presented for our consideration, therefore, the simple question whether a carrier who by a negligent delay in transporting goods has subjected them, in the course of transportation, to a peril which has caused their damage or destruction, and for the consequence of which the carrier would not have been liable had there been no negligent delay intervening, is liable for the loss.

On this question there is a well-recognized conflict in the authorities. In several well-considered cases decided by courts of high authority it was decided, while the question was still new, that the negligent delay of the carrier in transportation could not be regarded as the proximate cause of an ultimate loss by a casualty which in itself constituted an act of God, as that term is used in defining the carrier's exemption from liability, although had the goods been transported with reasonable diligence they would not have been subjected to such casualty, and these cases are very similar to the one before us inasmuch as the loss in each instance was due to the goods being overtaken by an unprecedented flood for the consequence of which the carrier would not be responsible. Morrison v. Davis, 20 Pa. 171; Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481; Railroad Co. v. Reeves, 10 Wall. 176; Daniels v. Ballantine, 23 Ohio St. 532; Hunt v. Missouri, K. & T. R. Co. (Tex. Civ. App.) 74 S. W. 69; Gleeson v. Virginia Midland R. Co., 5 Mackey (D. C.) 356. These cases are predicated upon the view that if the carrier could not reasonably have foreseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss, and should be disregarded in determining the liability for such loss. A similar course of reasoning has been applied in

other cases, where the loss has been due immediately to some cause such as accidental fire involving no negligence on the part of the carrier and within a valid exception in the bill of lading, but the goods have been brought within the peril stipulated against by negligent delay in transportation. Hoadley v. Northern Transp. Co., 115 Mass. 304; Yazoo & M. V. R. Co. v. Millsaps, 76 Miss. 855; General Fire Extinguisher Co. v. Carolina & N. W. R. Co., 137 N. C. 278. For similar reasons it has been held that loss of or injury to the goods by reason of their inherent nature, as by freezing or the like, will not render the carrier liable, even after negligent delay in transportation, if such casualty could not have been foreseen or anticipated as the natural and probable consequence of such delay. Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Herring v. Chesapeake & W. R. Co., 101 Va. 778.

On the other hand, it was held by the Court of Appeals of New York in a case arising out of the same flood which caused the destruction of the goods involved in Denny v. New York Cent. R. Co., 13 Gray (Mass.) 481, *supra*, that the preceding negligent delay on the part of the carrier, in consequence of which the goods were overtaken by the flood, was sufficient ground for holding the carrier to be liable for the loss. Michaels v. New York Cent. R. Co., 30 N. Y. 564; Read v. Spaulding, 30 N. Y. 630. And the same court had adhered to this view in case of a loss by fire covered by valid exception in the bill of lading. Condict v. Grand Trunk R. Co., 54 N. Y. 500. The Illinois Supreme Court has consistently followed the rule of the New York cases in holding that negligent delay subjecting the goods to loss by the Johnstown flood rendered the carrier liable (Wald v. Pittsburg, C., C. & St. L. R. Co., 162 Ill. 545), and likewise that similar delay rendered the carrier liable for damage to the goods by freezing. * * *

The irreconcilable conflict in the authorities is recognized by text-writers, and while the weight of general authority has in many cases been said to support the rule announced in Massachusetts and Pennsylvania cases (1 Thompson, Negligence, § 74; Schouler, Bailments [Ed. 1905] § 348; Hale, Bailments and Carriers, 361; 6 Cyc. 382; notes in 36 Am. St. Rep. 838), other authorities prefer the New York rule (Hutchinson, Carriers [2d Ed.] § 200; Ray, Negligence of Imposed Duties, 177). In the absence of any express declaration of this court on the very point,

and in view of the fact that in most recent cases the conflict of authority is still recognized (see 5 Cur. Law, 517) it seems necessary that the reasons on which the two lines of cases are supported shall be considered in order that we may now reach a conclusion which shall be satisfactory to us. * * *

Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper. This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier has been held not responsible for a loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation.

It is not sufficient for the carrier to say by way of excuse that while a proper and diligent transportation of the goods would have kept them free from the peril by which they were in fact lost it might have subjected them to some other peril just as great. He cannot speculate on mere possibilities. * * * The wrongful act of the carrier which in fact subjects the goods to loss renders him liable for such loss although the circumstances under which it occurred could not have been anticipated. * * *

We are satisfied that the sounder reasons, supported by good authority, require us to hold that in this case the carrier is liable for the loss of and damage to plaintiff's goods, and the judgment of the trial court is therefore reversed.

2) *Death by Negligence.*

HASSENYER *v.* MICHIGAN CENT. R. R. CO.

Michigan, 1882. 48 Mich. 205.

Defendant brings error.

COOLEY, J. The plaintiff in error was sued by the administrators of Louisa Hassenyer to recover damages for the negligence of its agents and servants whereby her death was caused. The case comes up on alleged errors in the admission and rejection of evidence, and in instructions given or refused.

The decedent was killed at the crossing of the railroad with Burdick street, one of the principal streets in the village of Kalamazoo, on the 20th day of December, 1878. She was a girl 13 years of age, and was proceeding along the street with a small pail of milk in her hands. The morning was somewhat cold and stormy. As she approached the railroad track a train was passing in one direction, and its bell was being rung. From the other direction an engine was backing up several cars, and its bell was also being rung. It was by this train that the girl was struck and killed. There was a flagman at the crossing, and no negligence seems attributable to him. The brakeman on the backing train was upon the ground, walking along by its side to guard against accidents, but did not notice the girl until she had been thrown to the ground and killed. No one saw the girl when she was struck, and the place where she was lying when first seen was outside the limits of the street.

It was contended for the defense that there was no evidence of negligence on the part of the railroad agents and servants, and therefore nothing to go to the jury. It was also insisted that a clear case of negligence on the part of the decedent appeared, and that upon this ground, if not upon the other, the court should have instructed the jury to return a verdict for the defendant. We do not agree that the case was so plain on either ground as to justify the court in taking it from the jury. It may be that if we were at liberty to pass upon the facts we should reach the conclusion which the defense insists upon as the only conclusion that is admissible; but we cannot say that the case is too plain upon the facts for fair minds to differ upon, and following our former decisions we agree with the trial court that the facts were properly left to the jury. Detroit, etc.

R. R. Co. v. Van Steinburg, 17 Mich. 99; Lake Shore, etc. R. R. Co. v. Miller, 25 Mich. 274, 295; LeBaron v. Joslin, 41 Mich. 313.

Upon a supposition that the jury might find that the decedent at the time she was struck and killed was outside the limits of the highway and upon lands belonging to the railroad company, the defense requested rulings in effect that if such was the fact the decedent was in law chargeable with negligence. We do not agree that this was necessarily the case. The fact might have an important bearing, or it might not; depending on how far she was outside the street lines, and why she was there, and whether she was aware of the fact. As the street was without fences or cattle-guards at this point, it would be unreasonable to hold that at her peril she must keep herself strictly within its lines, and if no intent to leave the highway was apparent, and she was not further outside than one might inadvertently go in passing along the street and looking both ways for coming and passing trains, the fact should neither absolve the employes of the railroad company from the observation of care to prevent injury, nor charge her with fault if otherwise sufficiently vigilant.

Counsel for the plaintiff in error has been industrious in the discovery of faults in the rulings of the circuit judge, but for the most part his criticisms are too particular and technical to be accepted, or to require discussion at our hands. With a single exception we think no error was committed to the prejudice of the party now complaining. The exception is found in the instructions to the jury respecting the degree of care required of the decedent to avoid the danger to which she fell a victim. It was contended for the plaintiff below that the law did not require the same degree of care of a child as of an adult person, and the court so instructed the jury. This was unquestionably correct. Railway Co. v. Bohn, 27 Mich. 503. But it was also insisted that the law did not expect or require the same degree of care and prudence in a woman as in a man; and the court gave this instruction also. It is presumable, therefore, that the jury in considering whether the decedent was chargeable with contributory negligence, made not only all proper allowances on account of her immature years, but further allowance also on account of sex.

No doubt the difference in sex has much to do with the application of legal principles in many cases. Police regulations with the utmost propriety sometimes make distinctions between

men and women, in the conduct required of them under the same circumstances, and the unwritten law is in some particulars more indulgent to the one sex than the other. Words and conduct which in the presence of men might be condemned for bad taste only, in the presence of women may be punishable as criminal indecency, and a crime of violence committed upon the one would be condemned less severely by public opinion and punished less severely by the law than the same crime committed upon the other. And no doubt also the law ought, under all circumstances where they become important, to make allowances for any differences existing by nature between men and women, and also for any that grow out of their different occupations, modes of life, education and experience. A woman, for example, driving a horse on a highway, may be presumed somewhat wanting in the "amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment—in short, the same degree of competency" which we may presume in a man; and the person meeting her under circumstances threatening collision should govern his own conduct with some regard to her probable deficiencies. Daniels v. Clegg, 28 Mich. 33, 42. In Snow v. Provincetown, 120 Mass. 580, a question of contributory negligence was made against a young woman who, in attempting to pass a cart in a public way, which had commenced backing towards her, accidentally fell over an embankment and was injured. The following instruction by the trial judge to indicate the degree of care required of the plaintiff, was held unexceptionable: "Care implies attention and caution, and ordinary care is such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances." This no doubt is true.

But while the authorities permit all the circumstances to be taken into the account, age and sex among the rest, in determining the degree of care to be reasonably required or looked for, no case, so far as we know, has ever laid it down as a rule of law that less care is required of a woman than of a man. Sex is certainly no excuse for negligence (Fox v. Glastenbury, 29 Conn. 204); and if we judge of ordinary care by the standard of what is commonly looked for and expected, we should probably agree that a woman would be likely to be more prudent, careful and particular in many positions and in the performance

of many duties than a man would. She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more cautious to avoid unknown dangers; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such as only great strength and courage could venture to encounter. Of a given number of persons travelling by cars, several men will expose themselves to danger by jumping from the cars when they are in motion, or by standing upon the platform, where one woman would do the same; and a man driving a team would be more likely to cross in front of an advancing train than a woman would. In many such cases a woman's natural timidity and inexperience with dangers inclines her to be more cautious; and if we naturally and reasonably look for greater caution in the woman than in the man, any rule of law that demands less must be unphilosophical and unreasonable.

Suppose, for instance, that a man and woman standing together upon the platform of a moving car are accidentally thrown off and injured, could any rule of law be justified which would permit a jury to award damages to her but not to him, upon the ground that the law expected and required of him the higher degree of care? Or may the woman venture upon an unsafe bridge from which the man recoils, under the protection of such a discrimination? Or trust herself to a fractious horse expecting, if she shall chance to be injured, the tenderness of the law will excuse her with a verdict of such care as was reasonably to be expected, when it would pronounce a man foolhardy? We think not.

No person of any age or sex is chargeable with legal fault who, when placed in a position of peril, does the best that can be done under the circumstances. Voak v. Northern Central Ry. Co., 75 N. Y. 320. Even this statement indicates a more rigid rule than the law will justify, for the legal requirement is only the observance of ordinary care; and while in laying down rules that are of general application, it is no doubt better to employ general terms, lest they be supposed applicable to particular classes only (Tucker v. Henniker, 41 N. H. 317); yet when the actor is a woman, an instruction that she is bound to observe the conduct of a woman of common and ordinary prudence, cannot be held legally erroneous because of being thus special. Bloomington v. Perdue, 99 Ill. 329.

Women may enter upon and follow any of the occupations of life; they may be surgeons if they will, but they cannot as such claim any privilege of exemption from the care and caution required of men. A woman may be engineer of a locomotive if she can obtain the employment, but the law will expect and require of her the same diligence to avoid mischief to others which men must observe. The rule of prudent regard for the rights of others knows nothing of sex. Neither can sex excuse anyone for the want of ordinary care when exposing one's self to known and obvious perils.

If it was apparent that the error of the judge did not mislead in this case, we might affirm the judgment. But that fact is not apparent. No one witnessed this accident; the question of due care is involved in doubts, and the erroneous ruling may have been controlling. It follows that there must be a new trial.

The other justices concurred.

DEMAREST *v.* LITTLE.

New Jersey, 1885. 47 N. J. L. 28.

In case. On rule to show cause etc.

MAGIE, J. This action was brought to recover damages for the death of plaintiffs' testator, which occurred in the disaster at Parker's Creek bridge, on the Long Branch Railroad, on June 29, 1882. Defendant was charged with responsibility therefor as receiver of the Central Railroad Company of New Jersey, and as having, in that capacity, contracted to carry deceased with due care.

The case was first tried in 1883, and a verdict rendered for plaintiffs, assessing their damages at $30,000. This verdict was afterwards set aside upon a rule to show cause. No opinion was delivered, but the court announced that a new trial was allowed because the damages were excessive. The case has been again tried, and the verdict has been again rendered for plaintiffs, assessing their damages at $27,500. A rule to show cause was allowed and is now sought to be made absolute upon the following grounds: first, that the evidence was not sufficient to justify the conclusion that testator's death was due to neg-

ligence or want of care; second, that if so, defendant, as receiver, was not liable for any negligence except his own, while the alleged negligence was that of employees; and third, that the damages awarded are excessive.

Upon the first ground it was urged that the evidence upon this trial was variant from and more favorable to defendant than that produced on the former trial. Whether that be so or not, a careful perusal of the evidence satisfies me that there was sufficient to warrant the conclusion that testator's death was due to negligence or want of proper care.

The second objecton has already been disposed of in a case growing out of this same disaster, and in which the Court of Errors has affirmed the responsibility of the receiver for such negligence. Woodruff's Adm'r v. Little, Receiver, 17 Vroom, 614. The verdict ought not to be disturbed on those grounds.

The question presented by the claim that the damages are excessive is of more difficulty. The action is created by statute which supplies the sole measure of the damages recoverable therein. They are to be determined exclusively by reference to the pecuniary injury resulting to the widow and next of kin of deceased by his death. The injury to be thus recovered for has been defined by this court to be "the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of deceased." Paulmier v. Erie Railway Co., 5 Vroom, 151. Compensation for such deprivation is therefore the sole measure of damage in such cases. A difficult task is thereby imposed upon a jury, for they are obliged to determine probabilities and "must, to a large extent, form their estimate of damages on conjectures and uncertainties." But the case in hand seems to present less complicated problems than other cases of the same nature.

Deceased left no widow, and but three children. All of them had reached maturity. Two sons were self-supporting; the daughter was married. He owed no present duty of support, and there is nothing to show any fixed allowance or even casual benefactions to them. They were therefore deprived of no immediate pecuniary advantage derivable from him. At his death he was in business, in partnership with his sons and son-in-law. All the partners gave attention to the business, and the capital was furnished by deceased. His death dissolved the partnership, and deprived the surviving partners of such benefit as they

had derived from his credit, capital, skill, and reputation. But the injury thus resulting is not within the scope of this statute, which gives damages for injuries resulting from the severance of a relation of kinship and not of contract. No damages could be awarded on that ground.

Defendants strenuously urge that, outside of the partnership, or in the event of its dissolution, the next of kin had a reasonable expectation of deriving from the parental relation an advantage by way of services rendered or counsel given by deceased in their affairs. A claim of this sort must be carefully restricted within the limits of the statute. The counsels of a father may, in a moral point of view, be of inestimable value. The confidential intercourse between parent and child may be prized beyond measure, and its deprivation may be productive of the keenest pain. But the legislature has not seen fit to permit recovery for such injuries. It has restricted recovery to the pecuniary injury; that is, the loss of something having pecuniary value.

Now it may with some reason be anticipated that a father, out of love and affection, might, if circumstances rendered it proper, perform gratuitous service for a child, which, by rendering unnecessary the employment of a paid servant, would be of pecuniary value, and that he might, by advice in respect to business affairs, be of a possible pecuniary benefit. But whether such an anticipation is reasonable or not must depend on the circumstances. Considering the age, the assured position, the business and other relations of these children, it is obvious that the probability of any pecuniary advantage to accrue to them in these modes was very small. Indeed, it would not be too much to say that resort must be had to speculation to discover any such advantage. At all events, compensation for this injury in this case could not exceed a small sum without being excessive.

The principal basis for plaintiff's claim is obviously this: that the death of deceased put an end to accumulations which he might have thereafter made and which might have come to the next of kin. Deceased had accumulated about $70,000, all of which, except $10,000 capital invested in the business, seems to have been placed in real estate and securities as if for permanent investment. By his will the bulk of his property was given to his children. At his death he had no other source of income than his investments and his business.

In determining the probability of accumulation by deceased if

he had continued in life, no account should be taken of the income derivable from his investments. These have come in bulk to the children, who may, if they choose, accumulate such income. A deprivation of the probability of his accumulating therefrom is no pecuniary injury. On the contrary, it is rather a benefit to them to receive at once the whole fund in lieu of the mere contingency or probability of receiving it, though with its accumulations (at best uncertain) in the future. Indeed, the benefit thus accruing to the next of kin in receiving at once this whole property, in the view of one of the court, is at least equivalent to the present value of the probability of their receiving it hereafter, if deceased had continued in life, with all his probable future accumulations from any source whatever, in which case it is evident that his death has not resulted in any pecuniary injury to them. But without adopting this view of the evidence, it is plain that in determining probable future accumulations attention should be restricted to such as would arise from the labor of deceased in his business. His receipts from the business for the two years it had been conducted were proved. What he expended was not proved, but left to be inferred from his mode of life. At death he was about fifty-six and a half years old and by the proofs had an expectation of life of sixteen and seven-tenths years.

From these facts the jury were to find what deceased would probably have acumulated, what probability there was that his next of kin would have received his accumulations, and then what sum in hand would compensate them for being deprived of that probability. In what manner the jury attempted to solve this problem we cannot ascertain. Plaintiffs' counsel attempts to show the correctness of the result reached, by calculation. He assumes the income of deceased from his business during the last year as the annual income likely to be obtained, and deducts only $1,000 each year as the probable expenditure of deceased, and then finds the present worth of the net income so determined for the deceased's expectation of life is $27,710.32.

This calculation tests the propriety of this verdict, and in my judgment conclusively shows that it was rather the result of sympathy or prejudice than a fair deduction from the evidence. For, assuming the amount attributable to the loss of deceased's services was but small (and if more it was excessive), the award of the jury on this account was but a few hundred

dollars less than the present worth of the full net income if received for his full expectancy of life. To reach such a result the jury must have found every one of the following contingencies in favor of the next of kin, viz.: that deceased, who had already acquired a competence, would have continued in the toil of business for his full expectancy of life; that he would have retained sufficient health of body and vigor of mind to enable him to do so, and as successfully as before; that he would have been able to avoid the losses incident to business, and would have safely invested his accumulations; and that the next of kin would have received such accumulations at his death. A verdict which attributes no more weight than this has, to the probability that one or more of all these contingencies would happen, cannot have proceeded from a fair consideration of the case made by the evidence.

Having reached this conclusion, what should be the result as to the verdict?

The charge of the court below declared the rule of damages with accuracy. The verdict is a second one, and somewhat smaller than that previously set aside as excessive. It is unusual to set aside a second verdict, but though unusual it is within the power of the court in the exercise of its discretion. That power will be discreetly used in setting aside any verdict which does palpable injustice.

To obviate, if possible, the necessity of another trial, it has been determined that if plaintiffs will reduce their verdict to $15,000 by remitting the excess, the verdict may stand for that sum, and the rule to show cause be discharged. Unless they consent to such remission, the rule must be made absolute.

HEGERICH *v.* KEDDIE.

New York, 1885. 99 N. Y. 258.

Appeal from a judgment of the General Term of the Supreme Court entered upon an order, which reversed a judgment in favor of the defendant, entered upon an order sustaining a demurrer to plaintiff's complaint. The action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant's testator.

Defendant demurred and claimed that the cause of action did not survive.

RUGER, CH. J. A brief reference to some of the elementary principles, applying to civil actions will serve the purpose, at least, of defining the terms used, and the modifications introduced, into the law by the statutes hereinafter referred to. Such actions were primarily divided into two classes, distinguished as actions *ex contractu* and *ex delicto*. The actions known as detinue, trespass, trespass on the case, and replevin were those used in causes of action arising from torts, and were described as actions *ex delicto*. Trespass on the case was the appropriate form of remedy for all injuries to persons or property which did not fall within the compass of the other forms of action. (3 Stephens' Com. 449.) At common law, originally, all actions arising *ex delicto* died with the person by whom or to whom the wrong was done. Thus, when the action was founded on any malfeasance, or misfeasance, was a tort, or arose *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a water-course, obstructing lights, escape, and many other cases of the like kind, where the declaration imputes a tort done either to the person or property of another, and the plea must be "not guilty," the rule was "*actio personalis moritur cum persona.*" (1 Wms. on Exrs. 668.) It was, however, held in Hambly v. Troth (Cowp. 371), Lord Mansfield delivering the opinion, that, "if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc, then the person injured has only a reparation for the *delictum*, in damages to be assessed by a jury. But, when, besides the crime, property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor." "So far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor, therefore, shall be charged." By the statute of 4th Edward III, chapter 7, actions "*de bonis asportatis*" were given to the executors of a deceased person for personal property taken from their testator and carried away, but for all other causes of action arising out of wrongs done either to the

person or property the rule of "*actio personalis moritur cum persona*" applied. (1 Wms. Exrs. 672.) Under the clause of the Constitution making the rules of the common law the law of the State, it must be held that these rules still determine the survivability of actions for torts, except where the law has been specially modified or changed by statute.

It had been held in this State prior to the enactment of the Revised Statutes that an action against the representatives of a postmaster for money feloniously abstracted from a letter by his clerk (Franklin v. Low, 1 Johns, 402), and against a sheriff's representatives for an escape occurring during his life-time (Martin v. Bradley, 1 Caines, 124), did not lie against such representatives. In the case of People v. Gibbs, 9 Wend. 29, decided in 1832, it was held that an action against the executors of a sheriff for the default of his deputy in returning process, notwithstanding an action in *assumpsit* for money had and received was by statute authorized therefor, did not lie, inasmuch as the cause of action was founded in tort.

As no reference is made in this case to the Revised Statutes, it is inferred that it arose previous to their enactment, although the case does not disclose that fact. Still the date of the trial, November, 1830, would not necessarily lead to such an inference. The Revised Laws (Vol. 1, p. 311) had theretofore enlarged the scope of the statute of 4th Edward III., and provided for actions by and against executors and administrators for property taken and converted by the testator or intestate during his life-time. Under this condition of the law the provisions of the Revised Statutes were enacted in 1828, and contain the rule by which this controversy must be determined. Section 1 reads as follows: "For wrongs done to the property rights or interests of another for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death, by his executors or administrators against such wrong-doer, and after his death, against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract." Section 2. "But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery or false imprisonment, nor to actions on the case for injuries to person of the plaintiff or to the person of the testator or intestate of any executor or administrator." It cannot

be successfully claimed that the language, "actions on the case for injuries to the person" up to this time did not include, according to universal classification, all actions without regard to the person or persons to whom they accrued, which had as their cause, or were founded upon injuries to the person of another arising from the negligent or careless conduct of a wrong-doer. It must also, upon well-settled principles of construction, be conceded that these terms were used according to their legal and well-understood signification at the time of their employment. If the language of the statute applicable to this case be collocated and read according to its plain meaning and intent, the following sentence would seem to be the result. Actions by and against executors and administrators for wrongs done to the property rights, or interests of their intestate or testator are hereby authorized, but so far as such wrongs have heretofore been remediable by actions on the case for injuries to the person of the plaintiff, or to the person of the intestate or testator of any executor or administrator, they shall not survive the death of the person to whom or by whom the wrong is done. The wrongs referred to in these sections are such only as are committed upon the "property rights, or interests" of the testator or intestate, and to a cause of action for which the executors and administrators acquire a derivative title alone. The whole scope and design of the statute is to extend a remedy already accrued, to the representatives of a deceased party, and provide for the survival only of an existing cause of action.

Among the questions which have arisen over the construction of these sections the most prominent are probably those relating to the signification of the words "property rights or interests," as used in the first section, and the effect of the enumeration in the second section, of certain specific actions as being excepted from the operation of the prior section. It is inferable from the opinions expressed in Haight v. Hayt, 19 N. Y. 464, that the court there supposed that the words "property rights or interests," as used in the statute, covered and included all injuries tortiously inflicted by one person to the detriment of another, whether affecting his person or property, and also that the mention of certain actions in the second section manifested an intention on the part of the law makers to exempt all others, founded on tort from abatement by death. The views expressed on those questions seem to have been unnecessary, as the action

there, was for a fraudulent representation with respect to incumbrances, whereby a purchaser of land at a public sale was induced, and the purchaser was compelled to pay an incumbrance which he was led to believe did not exist. The injury thus seems clearly to have been one to rights of property alone and was saved from abatement by the first section of the statute. The language and structure of these sections would seem to repel the idea that the exemptions provided by the second section were intended to authorize the survival of all other actions for tort. In the view implied by the language used in that case the first section would be quite unnecessary, as a provision specifying the classes of action which did survive would be superfluous if conjoined with one enumerating all actions not surviving. Such a construction gives the first section no office to perform, and the courts have practically rejected this interpretation in numerous cases, holding that causes of action abated by death which were not named in the second section. Thus it has been held that a cause of action by a master for the seduction of his servant does not survive (People *ex rel.* v. Tioga Com. Pleas, 19 Wend. 73); or for a fraudulent representation by a third person in reliance upon which credit is given to an irresponsible person (Zabriskie v. Smith, 13 N. Y. 322); or for a breach of a promise to marry (Wade v. Kalbfleisch, 58 id. 286); or for damages occasioned by the negligent killing of another (Whitford v. Panama R. R. Co., 23 id. 465); or for a penalty incurred by trustees under the General Manufacturing Act (Stokes v. Stickney, 96 id. 323); and for fraud in inducing one to marry another (Price v. Price, 75 id. 244).

The statute obviously created a great change in the law and applied to a numerous class of cases which had not before been held to survive. Thus it enlarged the rights created by the act of 4 Edward III., so as to include actions for trespass *de bonis asportatis* against representatives as well as by them, and removed the limitation which authorized other actions for wrongs against representatives only when the estate of their testator or intestate was benefited by the act complained of. The change is illustrated by the case of Benjamin's Exrs. v. Smith, 17 Wend. 208, where it was held that the cause of action accruing to a party against a sheriff for a false return did not abate by the plaintiff's death. This had previously been held otherwise. (People v. Gibbs, *supra.*) In People v. Tioga Com. Pleas, 19

Wend. 73, it was held that such actions alone as survived to executors and administrators were assignable, and that a cause of action by a master for the seduction of his servant was not assignable.

Although this action is based upon the theory of a loss of service by the master, it must inferentially have been determined that it did not affect the property rights or interests of the master, in such manner as to cause the right of action to survive. Grover, J., in Haight v. Hayt, said "that the statute had changed the law so far as property or relative rights are affected by the wrongful act." Judge Rapallo has said that "the rights and interests for tortious injuries to which this statute preserves the right of action have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests by injuries to which the estate of the deceased is diminished." (Cregin v. B. C. R. R. Co., 75 N. Y. 194.)

Reference to the law as it stood previous to the revision (and the application of the rule of construction embodied in the maxim of *noscitur a sociis*) would seem to require such an interpretation of the words "property rights or interests" as will confine their application to injuries to property rights only, and such as were theretofore enforceable by the deceased.

It is stated in 1 Wms. on Exrs. 677, "that no action is maintainable by the executor or administrator upon an implied or express promise to the deceased when the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate." Chamberlain v. Williamson, 2 M. & S. 408, is cited in support of this proposition. In that case Lord Ellenborough said:

"Executors and administrators are the representatives of the personal property, that is the debts and goods of the deceased; but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate." Accordingly it was there held "that an executor or administrator cannot have an action for a breach of promise of marriage to the deceased when no special damage to the personal estate can be stated on the record. So with respect to injuries affecting the life and health of the deceased, all such as arise out of the unskilfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney, such cases being in substance actions for injuries to the person."

This view of the law was approved in a similar case in this court. (Wade v. Kalbfleisch, *supra.*) It was said in People v. Tioga Com. Pleas, *(supra)*, by Cowen, J., that the cases in respect to executors and insolvent assignees, and the like, certainly go very far to direct what we are to consider matter of property or estate, so far that it can be touched by a contract, and made a subject of transfer between parties in any way at law or in equity; if the right be not so entirely personal that a man cannot by any contract place it beyond his control, it is assignable under the statutes of insolvency, or will, on his death, pass to his executors. The reason is because it makes a part of his estate; it is matter of property, and as such it is in its nature assignable. On the contrary, if it be strictly personal, it is beyond the reach of contract. In the same sense we say of many rights they are inalienable. No one would pretend that a man's person could be specifically affected by contract; though he should bind himself by indenture, equity could not enforce the agreement. (Mary Clark's lease, 1 Blackf. 122.) So of a man's absolute personal rights in general, as his claim to safety from violence, and his relative rights as a husband, a father, a master, a trustee, etc." This case was approved in McKee v. Judd, 12 N. Y. 622, and it was there said by Grover, J., that "demands arising from injuries strictly personal, whether arising upon tort or contract, are not assignable; but that all others are." In Green v. Hudson R. R. R. Co., 28 Barb. 9, approved in Whitford v. Panama R. R. *(supra)*, it was held that the husband at common law could not maintain an action for negligence causing the death of his wife; and that continued to be the law in this State until the act of 1847 was amended by chapter 78 of the laws of 1870. It was said by Judge Denio in Whitford v. Panama R. R. Co., *(supra)*, "It has never been suggested, so far as I know, that the personal representatives of a deceased person could at the common law sustain an action on account of the wrongful act of another, which caused the death of the person whose estate they represent." It would seem unnecessary to cite additional authorities to the effect that as the law stood at the adoption of the statute, neither a husband nor wife had such an interest in the life of their respective consorts as subjected a person, through whose negligent act it was taken, to the charge of injuring any property rights possessed by them.

From the same review, it is quite evident that the authors of

the statute intended explicitly to provide for the abatement of causes of action for personal injuries occurring to the plaintiff, or to his intestate or testator. The assignability and survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute, as it is possible to lay down. People v. Tioga Co. Com. Pleas, *supra;* Zabriskie v. Smith, *supra.*

The rights of property only which are in their nature assignable and capable of enjoyment by an assignee are those referred to in the statute. Such rights as arise out of the domestic relations clearly do not possess the attributes of property, and are not assignable by the possessor. (Id.)

The provisions of the Revised Statutes were, however, modified by chapter 450 of the laws of 1847, as amended by subsequent statutes, giving an action against persons and corporations, to the representatives of a deceased person, for the benefit of the husband or widow and next of kin, to recover damages for the pecuniary injuries suffered by them where death was caused by the wrongful act, neglect or default of another and the act, neglect or default was such as would (if death had not ensued) have entitled the party injured to maintain an action therefor, and in respect thereof against the person who or the corporation which caused the same, although the death was caused under such circumstances as in law amounted to a felony.

We are now to consider the effect which these statutes produced upon the law as it previously existed. The cause of action here provided for has been held not to be a devolution, but a new one calling for the application of another rule of damage and distinguished by many other attributes. Whitford v. Panama R. R. Co., *supra;* Haight v. Hayt, 19 N. Y. 464; McDonald v. Mallory, 77 id. 546; Littlewood v. Mayor, etc., 89 id. 24; Blake v. Midland R. R. Co., 18 A. & E. 93; Leggott v. Gt. N. Ry. Co., L. R. 1 Q. B. D. 604; Russell v. Sunbury, 37 Ohio St. 372; Yertore v. Wiswall, 16 How. Pr. 8. That it is founded upon the wrongful act of the party causing the death, and gives a right of action therefor to the representatives of the deceased, for the pecuniary consequences suffered by the husband, wife or next of kin from such wrongful act, is also established by the same authorities.

The cause of action is obviously the wrongful act, and the

pecuniary injuries resulting afford simply a rule to determine the measure of damages. However much the husband, widow or next of kin may suffer pecuniarily by the act causing death, it constitutes no cause of action, independent of evidence, that it was occasioned by the wrongful or negligent conduct of another. Proof that it occurred in consequence of the contributory negligence of the deceased person, or without the fault of the defendant, furnishes a perfect answer to such an action and a conclusive reason why the death produced by the wrongful act is the cause of action. The cause of action here provided for does not purport to be in any respect a derivative one, but is an original right conferred by the statute upon representatives for the benefit of beneficiaries, but founded upon a wrong already actionable by existing law in favor of the party injured, for his damages. The description of the actionable cause, seems to have been inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action. Whitford v. Panama R. R. Co., *supra.*

It will be observed also that the statute, although creating a new cause of action, and passed for the express purpose of changing the rule of the common law in respect to the survivability of actions, and conferring a right upon representatives which they did not before possess, does not undertake, either expressly or inpliedly, to impair the equally stringent rule which precluded the maintenance of such actions against the representatives of the offending party.

The plain implication from its language would, therefore, seem to be at war with the idea that the legislature intended to create a cause of action enforceable against, as well as by representatives. The cause of action thereby given is not to the estate of the deceased person, but to his or her representatives as trustees, not for purposes of general administration, but for the exclusive use of specified beneficiaries. Dickins v. N. Y. Cent. R. R. Co., 23 N. Y. 158; Yertore v. Wiswall, 16 How. Pr. 8.

The wrong defined indicates no injury to the estate of the person killed, and cannot either logically or legally be said to affect any property rights of such person, unless it can be maintained that a person has a property right in his own existence.

The property right, therefore, created by this statute is one existing in favor of the beneficiaries of a recovery only, and depends for its existence upon the death of the party injured. It had no previous life and cannot be said to have been injured by the very act which creates it. Whatever claim a wife or children have at law upon the husband and father for support perishes with the life of such person, and thereafter their claims upon his estate are governed by statutory rules.

If, therefore, we consider this cause of action as a property right, it is as such, a right based upon a tort, and, except as otherwise provided by the statute creating it, must be governed by the existing rules of law applicable to such causes of action. The case of Littlewood v. Mayor, etc., 89 N. Y. 24, holding that such causes of action may be settled and discharged by the injured party during his life-time, would seem to preclude the idea that the husband or widow and next of kin had any right of property in the cause of action created by the death of the party injured during his life-time. The question presented by the decision herein was, we think, determined adversely to the plaintiff by the case of Cregin v. Brooklyn Crosstown R. R. Co., 75 N. Y. 192. It was there held when an injury is done to the person of the plaintiff (and necessarily, by the terms of the statute, to that of his testator or intestate), "that the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single and consists of the injury to the person. The damages are the consequences merely of that injury, and when, by the terms of the statute, such a cause of action abates, the character of the damages cannot save it." The conclusions reached in that case tend necessarily to support the doctrine that the causes of action given by the act of 1847 and its amendments abate by the death of the person injured. It also holds that, so far as the personal estate and rights of property of the deceased person are injured by the wrongful act causing death, the cause of action therefor survives to his representatives by force of section 1 of the Revised Statutes, before referred to. Such an action exists independently of the Statute of 1847, and has been upheld in favor of representatives to the extent of giving damages for medical attendance and inability of the injured party to attend to business, for the time intermediate his injury and death, when the accident occurred while travel-

ing as a passenger upon the defendant's railroad. The action was there based upon the theory of a breach of contract to carry the passenger safely. Bradshaw and wife v. Lancashire & Yorkshire Ry. Co., L. R. 10 C. P. 189.

We have carefully considered the case of Needham v. Grand T. R. R. Co., 38 Vt. 294, but inasmuch as the statutes in that State affecting the question are so different from our own, little analogy exists between the question there presented and the one under consideration. The case of Yertore v. Wiswall, *(supra)* is entitled to great respect from the learning and ability of the court by which it was decided. But, although agreeing with some of the propositions entertained by it, we are unable to concur in the conclusion reached, that the cause of action there considered, survived.

The complaint in the present action describes a cause of action arising out of the death alone, and suggests no injury to the estate or property of the deceased. Such a cause of action is abated by the death of the wrong-doer.

The judgment of the General Term should, therefore, be reversed, and that of the Special Term affirmed.

All concur; FINCH, J., in result.

Judgment accordingly.

DENVER & R. G. R. CO. *v.* SPENCER.

Colorado, 1900. 27 Colo. 313.

This action was commenced by the appellees to recover damages for the death of their father, caused by the alleged negligence of the appellant. From a verdict and judgment in their favor the defendant appeals.

GABBERT, J. * * * The final question relates to the amount of damages assessed by the jury. The verdict was in the sum of $4,000, which appellant contends is excessive. The right of appellees to maintain this action is purely statutory. It did not exist at common law. The damages which they are entitled to recover must be limited to those of a compensatory character—in other words, to such pecuniary damages as they have sustained by reason of the death of their father. As aptly stated by the late Justice Elliott in Pierce v. Conners, 20 Colo.

178: "The true measure of compensatory relief in an action of this kind, under the act of 1877, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of defendant; * * * but it must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law."

At the time of his death his wife was living, and survived him about two years. The appellees were in no manner dependent upon him for support. The mere relationship between them and deceased cannot be made the basis of a recovery in this case, however much they may have grieved over his untimely death. Therefore, as stated in the former opinion in this case, "the pecuniary loss, if any, that resulted to them by reason of the death, was in being deprived of their share of the money that he might accumulate during his expectancy of life." Or, under the evidence, their recovery must be limited to the sum which the father, by his personal exertions, less his necessary personal expenses, and those of his wife during her life, would have added to his estate, and which would have descended to the appellees, as his heirs at law. The court so instructed the jury. Was this instruction followed? At the time of his death, deceased was upward of sixty-eight years of age. His expectancy of life was about nine and one-half years. There is testimony to the effect that at the time of his death his annual income, arising from his personal exertions, after deducting his personal expenses, equaled the sum of about $1,000 per annum, although the evidence is not entirely satisfactory upon this point, for the reason that the witness testifying on this subject was not certain that he was fully advised regarding the personal expenditures of the father. The money earned by deceased from this source consisted of a salary of $1,500 per annum as an employe of a bank, and about $500 more per annum, earned as a conveyancer and notary, in connection with his bank duties. He had considerable income from investments, but this cannot be considered, in estimating his annual savings. We mention this,

however, because it appears that his net worth at the time of his death could not have been so very much in excess of the value of his bank stock, which was $6,400, because it appears that his other investments were incumbered in such an amount that, after deducting interest, there was but little left in the way of income from these sources, after payment of taxes. Had he lived the full term of his expectancy, and during that period been able at all times to continue to engage in the work in which he was employed at the time of his death, his net personal earnings would have exceeded much more than the damages awarded. It cannot be fairly assumed, however, or expected, that, at his advanced age, he would have continued to labor during all the future years of his life. In considering this question, account should be taken of his liability to illness, his incapability of further exertions by reason of age, and that he might, on account of his years, conclude to retire from active work; that, in all probability, his age would soon incapacitate him from discharging his duties as an employe in the bank, in which he was engaged; that, if he did continue to earn money for a portion of his expectancy of life, he would at least expend a part so earned for personal use during the remaining years. All these are contingencies which must be considered. Necessarily, the ascertainment of damages, dependent upon a variety of circumstances and future contingencies, is difficult of exact computation; but, nevertheless, they cannot be presumed and arbitrarily given. Undoubtedly much latitude must be given a jury in cases of this character, but there must be some basis of facts upon which to predicate a finding of substantial pecuniary loss. Diebold v Sharp, 49 N. E. Rep. 837.

Except for the statute, appellees could not maintain this action. Its provisions are beneficent, but limited. In no case under it can damages exceed the sum of $5,000. Taking into consideration the evidence upon which the award of damages is based in this case, the contingencies to which we have directed attention, the improbability that deceased, during the remaining years of his life, would have saved from net personal earnings a sum anywhere nearly approximating the damages awarded, and the disproportion of that sum to his previous accumulations, it is evident that the jurors certainly failed to consider the instructions of the court on the subject of damages, but must have been influenced by considerations other than those which the

law recognizes as elements of damages in such cases. For these reasons, the judgment of the district court is reversed and the cause remanded for a new trial.

Reversed and remanded.

BROUGHEL v. SOUTHERN NEW ENG. TEL. CO.

Connecticut, 1901. 73 Conn. 614.

Action to recover damages for instantaneous death through defendant's negligence.

TORRANCE, J. The important questions upon this appeal are these: (1) Under our statutes relating to death by wrongful act, can there be a recovery of substantial damages for mere loss of life alone? (2) If so, what is the measure of damages in such case? These questions will be considered in the order stated.

When this case was before this court in another aspect of it, one of the points decided was that the mere fact that death was instantaneous, and without pain or suffering of any kind, did not of itself prevent the recovery of substantial damages. Broughel v. Telephone Co., 72 Conn. 617. In effect, that case, we think, decides the first question against the contention of the defendants. It was found by the trial court in that case that death was the sole and only consequence of the negligent act, and yet it was decided that the plaintiff was entitled to recover substantial damages for that consequence. That decision can only be supported on the theory that under our statutes of the kind here in question damages may be recovered for the mere loss and deprivation of life alone, for in that case it was found that no other consequence save mere loss of life followed from the negligent act. A negligent act causing death is an invasion of the right to life, the first and highest of all rights, on which all others are based. That act may be attended by divers consequences and effects. It may be followed —as it is found it was in the present case—by death alone, instantly and painlessly; or it may be followed by bodily and mental suffering and agony as well as by death. We think our statutes make the wrongdoer in such cases liable in damages to the executor or administrator of the decedent for any and all such consequences, and among them for the mere loss and de-

privation of life. For such consequences he is to pay "just damages," not exceeding a prescribed amount. This view of this matter was the one taken in Murphy v. Railroad Co., 30 Conn. 184. This court there said: "If to take one's liberty or one's property without justification is an injury, how much more is the taking of human life? The elementary books, in speaking of absolute rights, classify them thus: (1) The right of personal security; (2) the right of personal liberty; and (3) the right to acquire and enjoy property. If these rights are valued in this order of preference, then every man of common understanding would at once pronounce it absurd to hold that it is no injury to a person to take his life, while it is to strike him a light blow. Such a distinction is not worth talking about, and has no foundation or existence in the law, as it has none in common sense." In the legislation of this state, statutes making wrongdoers liable in damages for mere loss of life have been quite common. The first printed edition of the statutes contained a provision of this kind. It was therein provided that, "if any person shall lose his life" by means of a defective bridge or highway under certain circumstances, the wrongdoer should pay "to the parents, husband, wife, or children, or next of kin to the person deceased," the sum of $334, to be recovered in an action at law. Revision 1808, p. 120. In 1851 an act was passed providing that, "if any person shall be deprived of life" in consequence of certain acts or omissions of the servants of any railroad company, such company should pay to the parties named in the act the sum of $1,000, to be recovered in an action of debt on the statute. Pub. Acts 1851, c. 43. In 1853 an act was passed providing that, if the life of any person "shall be lost" under certain prescribed circumstances by reason of the negligence of a railroad company, such company should be liable to pay damages not exceeding $5,000 nor less than $1,000 to the person described in the act. Pub. Acts 1853, c. 74. In 1869 an act was passed providing that, if the life of any person "shall be lost" by the neglect of a railroad company to maintain fences as prescribed in the act, such company should be liable to pay damages not exceeding $5,000 to the persons named in the act. Pub. Acts 1869, c. 48. In 1877 a general act was passed providing that for injuries "resulting in death" from negligence "the party legally in fault for such injuries" should be liable for "just damages, not exceeding five thousand dollars." Pub. Acts 1877, c. 78,

These and other acts of a kindred nature, as they existed at the time of the Revision of 1888, were embodied in sections 1008 and 1009 of that revision, and it was under the provisions of these sections that the present suit was brought. This legislation clearly shows an intent to make wrongdoers in certain cases, and under certain limitations, liable in damages for mere loss or deprivation of life; and there is nothing in any legislation prior or subsequent to 1888 that indicates an intent on the part of the legislature to exempt such wrongdoers from such liability. We are not aware of any decision of this court that is inconsistent with the view here taken of the legislation in question, and we are satisfied that it is the correct one.

The next question relates to the measure of damages for mere loss of life. So far as we are aware, this question, in the precise form in which it is now presented, has not before been passed upon by this court, and we are at liberty to decide it upon principle. It is probably true, in point of fact, that in suits heretofore brought in this state for injuries resulting in death from wrongful act the value of the life of the deceased has, with other elements, entered into the award of damages; but, if so, that element has not been, so far as we are aware, separately discussed or considered by this court. The statutes upon this subject do not, in terms, at least, furnish any guide in this matter. They merely provide that the wrongdoer in such cases shall pay "just damages," not exceeding $5,000. There are, however, certain considerations arising out of the nature and character of this kind of legislation in our state, and out of the nature of death as one of the harmful consequences of an injury, that may serve as guides in coming to a right conclusion in this matter. From the beginning our legislation of this kind was intended to subserve at least two purposes: (1) It was designed to make persons and corporations whose negligence might injuriously affect the lives and limbs of others more careful and circumspect, by continuing their liability for the results of their negligence even after the death of the victim, and by making them liable in damages, to a limited extent, for death, as one of the consequences of that negligence. In this aspect of it, this legislation may be said to be of a punitive or penal character. Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265, 273. (2) This legislation was also and mainly designed to make some compensation in money for mere loss of life, which com-

pensation, as part of the estate of the injured party, should go to certain designated persons; not full compensation of this kind for such a consequence, but "just damages," not exceeding a prescribed amount. In this last aspect of it this legislation plainly contemplates that the extent of such loss may be greater in one case than another; or, to put this in a different way, that the value of the life to the injured party—or, what is the same thing, to his estate—in terms of money may be greater in one case than in another. Under our decisions the loss of life is not to be estimated from the standpoint of the statutory beneficiaries. Their loss, if any, arising from the death cannot be taken into account. Goodsell v. Railroad Co., 33 Conn. 51; McElligott v. Randolph, 61 Conn. 157. This being so, the only other thing that can be done is to estimate the loss from the standpoint of the party injured, and thus, in a sense, take the value of his life to him as one of the elements in measuring the damages. But in what sense shall the value of his life to him be taken as such an element? Shall it be what the man thought or imagined his life was worth to him; that is, what a man would take in exchange for his life? Clearly not. In that aspect of the injury there can be no measure for it, because a man's life to himself, no matter what his age, or condition of health, or expectancy of life may be, outweighs in value the universe. In that sense it is folly to talk of the value of any life being worth less than the maximum sum prescribed by the statutes. Our statutes, in providing compensation in part for death alone as the consequence of a negligent act, do not proceed upon any such view of the value of life as this, else would they have provided for a fixed sum as damages in each case; but they proceed, in part at least, upon the theory that a loss of earning capacity by death is a loss to a man's estate, which may be greater or less according to circumstances, and so within a maximum limit a sliding scale of damages is provided. Under these statutes the right to recover a limited compensation for death alone as one of the results or consequences of a wrong inflicted upon a man in his lifetime survives to, or is vested in, his executors or administrators for the benefit of certain designated beneficiaries, and is thus in a certain sense made a part of his estate, regarded as that aggregate of rights and possessions which a man leaves at his death. This legislation seems to regard the life of the person injured as having a greater or less value, according to circum-

stances, to him, or, what is the same thing in this connection, to his estate; and one of its objects in awarding damages for mere loss of life is to compensate his estate, in the sense above explained, for that loss; and in cases like the present that loss, thus measured, may be the chief or only element to be considered in fixing the extent of the defendant's liability. We do not mean to say that this would be the only element to be considered in cases like the one at bar, but only that ordinarily in them it might or would be the principal element. It is unnecessary here to decide what other elements, if any, may properly be considered in such cases, for we think the trial court took as the measure of damages in this case the loss to the estate of Davis in the sense above explained, and it does not appear that in fixing the quantum of damages it considered any other element. It is true, the court says that it took as the measure of damages "the value of the deceased's life, at the time of the injuries, to himself;" and it is true that this language is somewhat ambiguous. It may mean that the court took as the measure of damages what a man would take in exchange for his life, or it may mean that the court measured the damages by the loss to the estate of the decedent in the sense above explained. We think this last is what the court did, and what it meant to say it did, for it heard, and, we are bound to presume, considered, evidence which it would neither have heard nor considered if it had proceeded upon the other view of the extent of the loss. But it is said that a loss of this kind is too vague, indefinite, and uncertain to be estimated pecuniarily, and is, in its nature, incapable of judicial determination. We think there is nothing in this claim. Injuries, in the sense of wrongful invasions of a right, may be considered as of two kinds: (1) Pecuniary, and (2) nonpecuniary. Pecuniary injuries are such as can be, and usually are, without difficulty estimated by a money standard. Loss of real or personal property or of its use, loss of time, and loss of services, are examples of this class of injuries. Nonpecuniary injuries are those for the measurement of which no money standard is or can be applicable. As the books phrase it, damages in such cases are "at large." Bodily and mental pain and suffering are familiar examples of this class. It is within this last class that injury arising from loss of life under our statutes falls. There is no more legal difficulty in estimating damages for loss of life in cases like the present than there is

in estimating damages for bodily or mental pain and suffering, or for maim or disfigurement, or for injured feelings; and yet damages for this sort of injury are being constantly estimated and awarded by the courts in proper cases. The difficulty, or even impossibility, of estimating with certainty in money the amount of injury in this class of cases is never considered a reason for refusing redress. Cook v. Bartholomew, 60 Conn. 26; Post v. Railway Co., 72 Conn. 362; Railroad Co. v. Allen, 53 Pa. 276; Ballou v. Farnum, 11 Allen, 73. In the view we have taken of this case, the rulings upon evidence of which the defendant complains were correct, and the rulings upon the claims of law made by the defendant were also correct. There is no error.

The other judges concurred.

SMITH *v.* LEHIGH VALLEY R. CO.

New York, 1904. 177 N. Y. 379.

Action by Porter D. Smith, administrator of Amy A. Smith, against the Lehigh Valley Railroad Company, to recover damages for the death of plaintiff's intestate.

PARKER, C. J. * * *

We are also of the opinion that the court erred in admitting in evidence the photograph of deceased. The action was to recover for pecuniary injuries resulting from decedent's death. Code Civ. Proc. § 1904. Such injuries are to be compensated for on the basis of the monetary value of the services of deceased to her husband and children. Into such a case the personal element does not enter, for the law does not compensate for grief or sorrow, but only for the actual pecuniary loss. The introduction in evidence of the photograph of a handsome woman could not be expected to accomplish any other result than to introduce the personal element for the consideration of the jury. Certainly the language employed in Lipp v. Otis Brothers & Co., 161 N. Y. 559, would seem to be applicable to the introduction of this photograph: "Clearly, the testimony we have been considering could not render any service in the case other than to awaken the sympathies and thus influence the judgment of the jurors in the direction of a greater award, nor is it reasonable to assume that any other result was expected from it." In that

case this court reversed a judgment obtained by a father, as sole next of kin, for pecuniary injuries resulting from his son's death. No one except the father was entitled to recover, and yet plaintiff was permitted to question a brother of deceased as to brothers, sisters, nephews, and nieces of deceased, and their necessities—testimony which pointed out opportunities plaintiff would have for making charitable use of any moneys left after satisfying his own necessities. The reason for the decision in that case calls for a decision in this, that evidence of such a character should not be received in cases where the personal element is not permitted by the statute to enter, as in this case.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Under Lord CAMPBELL'S Act, the jury can consider the amount of decedent's property, his age, and prospective increase of wealth, and also that he might have married, and his fortune gone in other channels. R. R. Co. v. Barrow, 5 Wall 90. Minor children can recover for loss of individual pecuniary benefits. Terry v. Jewett, 78 N. Y. 338. Under some statutes, as in New York, remote collateral kinsmen may recover. Evidence as to damage must be presented to the jury; the jury cannot give a verdict with nothing before them. Beeson v. Mining Co., 57 Cal. 20; Morgan v. Southern Pacific Co. 97 Cal. 510. Pain suffered by decedent prior to his death is not an element of damage. Judge PHILLIPS says in C. B. & Q. R. R. v. Gunderson, 174 Ill. 499: "The right of lineal kindred to at least nominal damages, without proof of support, is given by the statute." It is not error for the trial judge to charge the jury without elaboration, that it could give the plaintiff only the money value of the wife's life to him, unaffected by sentimental considerations. Waechter v. Second Ave. Traction Co., 198 Pa. 129. The obligation created by the New York act (Code Civ. Proc., sec. 1902) can not be enforced against a city for death caused by unsanitary conditions. Hughes v. City of Auburn, 161 N. Y. 96.

Contributory negligence by decedent is a bar to recovery. Schlemmer v. Buffalo R. & P. Ry. Co. (Penn. 1909), 71 Atl. Rep. 1053.

Compensation must be limited to the pecuniary loss sustained; a husband is entitled to recover to the value of the services his wife may discharge in her domestic duties; and the cost of maintenance must be deducted from the value of such services. Gorton v. Harmon, 152 Mich. 478.

Where plaintiff has married a second wife, since the wrongful killing, who performs all the services rendered by the deceased wife, the jury cannot consider this in mitigation of damages. Chicago & E. I. R. Co. v. Driscoll, 207 Ill. 9.

In estimating pecuniary loss the jury can consider the loss of society,

comfort and care suffered by kinsmen in the death of husband and father. Dyas v. Southern Pacific Co., 140 Cal. 296.

Plaintiff cannot recover for "protection and support" to be received by him from his female child. Quill v. Southern Pacific Co., 140 Cal. 268.

Damages may not be awarded for mere loss of society, regardless of any actual pecuniary loss. Wales v. Pacific Electric Motor Co., 130 Cal. 521.

Damages to a father from the death of a boy must be such as would compensate him for his expectation of pecuniary benefit from the deceased; a verdict of $5,000 was set aside. Graham v. Consolidated Traction Co., 64 N. J. L. 10.

It is immaterial that a crippled son of decedent needs support on account of his helpless condition. Chicago, P. & St. L. R. R. v. Woolridge, 174 Ill. 335. "The feelings of the widow and next of kin, their wealth or poverty, or any other fact than the pecuniary injury, cannot be considered in assessing the damages." R. R. v. Baches, 55 Ill. 379.

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2. *Trespass.*

PERROTT *v.* SHEARER.

Michigan, 1868. 17 Mich. 48.

This was an action of trespass for seizing and taking certain goods of the plaintiff. The goods were destroyed by fire, while in the possession of such officer.

COOLEY, CH. J. The plaintiff in error, as sheriff of the county of Bay, by virtue of a writ of attachment against the goods and chattels of Henry H. Swinscoe, levied upon a stock of goods which Shearer claimed as assignee of the firm Swinscoe & Son, composed of said Henry H. Swinscoe and George E. Swinscoe. * * *

The principal question in the case springs from the fact that the goods, while under the control of the defendant, in pursuance, as the plaintiff claimed, of said attachment levy, were accidentally destroyed by fire. The plaintiff, it appears, held, at the time, insurance policies upon them to their full value, and, after the fire, presented to the insurance companies proofs of the loss, and received pay therefor. Upon this state of facts it was claimed by defendant, that plaintiff's position was the same as if he had repossessed himself of the goods by replevin; and that he was entitled to recover damages only for their detention

up to the time of the fire. The Circuit Judge held differently, and instructed the jury that the plaintiff was entitled to recover the full value of the goods, and he had judgment for the value accordingly.

It certainly strikes one, at first, as somewhat anomalous, that a party should be in position to legally recover of two different parties the full value of goods which he has lost; but we think the law warrants it in the present case, and that the defendant suffers no wrong by it. He is found to be a wrong-doer in seizing the goods, and he cannot relieve himself from responsibility to account for their full value except by restoring them. He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists. He has no equities as against the plaintiff which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he ran when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner, under such circumstances, keeps his interest insured, he cannot be held to pay the money expended for that purpose for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is, therefore entitled to the benefit of it, if any benefit shall result. The trespasser pays nothing for it, and is, therefore, justly entitled to no return. The case, we think, is within the principle of Merrick v. Brainard, 38 Barb. 574, which appears to us to have been correctly decided. The plaintiff recovers of the defendant for the wrong that has been done him in taking his goods; and he recovers of the insurance company a large sum for a small outlay, because such payment was the risk they assumed, and for which they were fairly compensated. It is not a question of importance in this inquiry whether the act of the defendant caused the loss or not: his equitable claim to a reduction of damages, if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to this is, that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in

no way privy, and in respect to which his own wrongful act can give him no equities.

We discover no error in the record, and the judgment must be affirmed, with costs.

CAMPBELL and GRAVES, JJ., concurred.

STODGHILL *v.* CHICAGO, BURLINGTON, & QUINCY RAILROAD.

Iowa, 1880. 53 Ia. 341.

Christopher Stodghill was the owner of a farm of some four hundred and eighty acres in Wapello County. Part of said farm consisted of a tract of twenty-nine acres of creek or pasture land. The defendant's right of way for its railroad was located along the north line of said tract. The natural channel of North Avery Creek ran across the right of way upon said tract, meandered through it, and recrossed the north line of the land, and the right of way. When the railroad was constructed, bridges were built across the creek which spanned the channel, and did not obstruct the passage of the water in the stream, nor divert it from where it was wont to flow. In 1874 the defendants cut a channel on the north side of their right of way, and filled in the bridge where the stream entered plaintiff's land, with earth, which diverted the stream into the new channel entirely, except as the water backed through a culvert at the point where the water recrosses the right of way; the said bridge at the last-named point having been previously removed, a culvert there constructed, and the stream filled in at this point, except the culvert aforesaid.

Christopher Stodghill commenced an action against the defendant for damages to his land by reason of the diversion of the stream. He recovered a verdict and judgment for one dollar and costs. The case was affirmed upon appeal to this court. See Stodghill v. C. B. & Q. R. Co., 43 Iowa, 26.

Said Stodghill died in the year 1876, and by his last will and testament, which was duly admitted to probate, he devised the said twenty-nine acres with other of his lands to the plaintiff. This action was commenced in February, 1877, to recover damages for continuing to divert the water from the natural channel

of said creek, and for a judgment directing the abatement and removal of the embankments in the original channel.

There was a trial by the court without the intervention of a jury, and a judgment was rendered for plaintiff for one dollar actual damages, and seventy-five dollars exemplary damages, and an order was made requiring the defendant to abate and remove said obstructions from the natural channel of the creek. Defendant appeals.

ROTHROCK, J. When the earth was deposited in the channel of the creek and raised to a sufficient height to cover over the bridge and make a solid embankment upon which to lay the railroad track, the water in the creek was at once turned into the new channel. The principal question in the case is whether the judgment for damages in favor of Christopher Stodghill was a full adjudication for all injuries to the land, not only up to the commencement of that suit, but for all that might thereafter arise. In Powers v. Council Bluffs, 45 Iowa, 652, the question being as to what is a permanent nuisance, it was held that where it is of such character that its continuance is necessarily an injury, and that when it is of a permanent character that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated; that successive actions will not lie, and that the Statute of Limitations commences to run from the time of the commencement of the injury to the property. That was a case where the plaintiff sought to recover damages against the city for diverting the natural channel of a stream, called Indian Creek, by excavating a ditch in a street in such a manner that it widened and deepened by the action of the water, so as to injure plaintiff's lot abutting upon said street. The same rule was recognized in Town of Troy v. Cheshire Railroad Co., 3 Foster (N. H.), 83. In that case the defendant constructed the embankment of its railroad upon a part of a highway. The action was by the town to recover damages. The plaintiff claimed that it was entitled to recover for the damages for the permanent injury. The court said: "The railroad is in its nature, design, and use, a permanent structure, which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain a

highway. The injury done to the town is, then, a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages."

The case at bar is much a stronger illustration of what is a permanent nuisance or trespass for which damages, past, present, and prospective, may be recovered, than Powers v. Council Bluffs. In this case the damages to the whole extent were at once apparent. The water was diverted from the natural channel as soon as the embankment was raised to a sufficient height to turn the current into the new channel. The injury to the land was then as susceptible of estimation as it ever afterwards could be, and without calculating any future contingencies. In the other case, when the water commenced to flow in the new channel the plaintiff's lots were not injured. It required time to wash away the banks and work backward before the injury commenced. It is not necessary to dwell upon this question. The rule established in Powers v. Council Bluffs, *supra*, is decisive of this case. See, also Chicago & Alton R. R. Co. v. Maher, Supreme Court of Illinois, Chicago Legal News, July 5, 1879. Counsel for appellee contend that the railroad embankment is not permanent because it is liable to be washed out by freshets in the stream, and cannot stand without being repaired. There is no evidence in this record tending to show that the embankment is insufficient to accomplish the purpose for which it was erected; that is, to make a solid railroad track and divert the water into the new channel. One witness testified that it is from sixteen to eighteen feet high. We will not presume that the defendant was guilty of such a want of engineering skill as not to raise its embankments so that they will not be affected by high water. It seems to us that a railroad embankment, of proper width and raised to the proper height, is about as permanent as anything that human hands can make. Before leaving this branch of the case, it is proper to say that the acts complained of were done within the limit of the defendant's right of way, and the injury, if any, to the plaintiff's land, was consequential. The defendant did not enter upon plaintiff's land to take a right of way for its railroad, and Christopher Stodghill did not bring his action to recover upon that ground. As we have a statute providing for proceedings to condemn the land necessary to be taken for right

of way for railroad purposes, it may be that the mode of ascertaining the damages prescribed by the statute must be pursued. See Daniels v. C. & N. W. R. R. Co., 35 Iowa, 129. That question, however, is not in this case, and we only refer to it lest we may be misunderstood.

Christopher Stodghill, in his petition in the former action, averred that the diversion of the stream from its natural course across said land perpetually deprived him of the use thereof, to his great damage in the prosecution of his business, and in the depreciation in the value of his said farm and pasture lands, and he claimed damages in the sum of $499. The court instructed the jury in that case that they were not to consider the question in regard to any permanent damage to the land, for the reason that the plaintiff had the right to institute other suits to recover damages sustained after the commencement of the action.

But the plaintiff claimed damages generally, and by his pleadings he and those holding under him must be bound. Indeed, we do not understand counsel for appellee to contend otherwise. The damages being entire and susceptible of immediate recovery, the plaintiff could not divide his claim and maintain successive actions. The erroneous instructions of the court to the jury did not affect the question. It was the duty of the plaintiff to have excepted and appealed. "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of litigation." Freeman on Judgments, sec. 249. And see Dewey v. Peck, 33 Iowa, 242; Schmidt v. Zahensdorf, 30 Iowa, 498.

The foregoing considerations dispose of the case, and it becomes unnecessary to examine or determine other questions discussed by counsel.

Reversed.

KOERBER *v.* PATEK.

Wisconsin, 1905. 123 Wis. 453.

Action to recover damages for mutilation of the dead body of plaintiff's mother. Appeal from an order sustaining a demurrer to the complaint.

DODGE, J. This action presents a field for consideration uncharted by any direct decisions in this court. The primary and general question is whether any relative, having the conventionally recognized duty of providing proper obsequies and sepulture for the remains of a deceased relative, has any rights, enforceable by courts, to be protected in the performance of that service. It is said the law protects only the person and the purse (Chapman v. W. U. Tel. Co., 88 Ga. 763), and doubtless, as an epigrammatic generalization, this is reasonably correct. Upon this basis it is argued that such a complaint as the present presents no case of injury either to property or person of the plaintiff—clearly not to the person physically, and not to the property, it is argued, because there can be no property in a dead body. * * *

For the purposes of this case we shall not deem it necessary to consider whether a corpse can be, in any respect, property. From the authorities cited, and from original reason, the conclusion seems to us irresistible that in the nearest relative of one dying, so situated as to be able and willing to perform the duty of ceremonious burial, there vests the right to perform it, and that this is a legal right, which, as said in some of the cases, it is a wrong to violate, and which, therefore, courts can and should protect and vindicate. * * *

We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency; certainly none where the law need less hesitate to impose upon a willful violator responsibility for the uttermost consequences of his act. We recognize, of course, that public welfare may and does require governmental control in many respects for protection of life and health of the people, and for discovery of crime connected with the death of a person, and to such interests the private right is subservient so far as necessary. Upon this ground rest cases of autopsies upon dead bodies under public authority, and to satisfy police regulations for ascertainment of cause of death.

The question whether anything more than nominal damages can be recovered has been earnestly argued by counsel, and is only second in importance to that of the existence of any cause of action at all, for, obviously, in cases of this character, any pecuniary loss to plaintiff must usually be merely trifling. The great injury done consists in the outrage upon the sensibilities. Can such injury be considered as legal damage, otherwise than by way of imposing punitory damages in case of actual malice? It is settled in this as in most jurisdictions that mental suffering may be an actual injury, for which award is to be made strictly as compensation in proper cases. Wilson v. Young, 31 Wis. 574; Gatzow v. Buening, 106 Wis. 1. Such injury, however clearly existent, has been held not a proper element of recoverable damages in actions on contract, except breach of promise of marriage. Walsh v. Ry. Co., 42 Wis. 23; Giese v. Schultz, 53 Wis. 462. Nor in actions of mere negligence, unless, as a proximate result of the negligence, there be physical injury from which flows the mental suffering. Summerfield v. W. U. Tel. Co., 87 Wis. 1. In these respects we differ from a few courts which have adopted what is known as the "Texas doctrine," applied originally to failure to deliver telegrams, but since to other phases of both negligence and breach of contract causing mental anguish. In Indiana it has been invoked to support such damages resulting from breach of contract to prepare and preserve a corpse for burial. Renihan v. Wright, 125 Ind. 536. That doctrine, with its supporting authorities, was reviewed fully in the Summerfield Case, and repudiated. The only other tort action in Wisconsin where mental suffering was denied as an element of compensatory damages is Gatzow v. Buening, 106 Wis. 1, which was for a conspiracy to induce the breaking of a contract to supply a hearse for a funeral; the contract being broken, and, as a result, the funeral interrupted. In many other tort actions mental distress has been held a proper independent element of damage, though in no wise resulting from a physical injury, but directly from the wrongful act—from the outrage of some legal right. Only a few such need be cited. Craker v. Ry. Co., 36 Wis. 657; Fenelon v. Butts, 53 Wis. 344; Stutz v. Ry. Co., 73 Wis. 147; Grace v. Dempsey, 75 Wis. 313; Pelardis v. Journal Printing Co., 99 Wis. 156; Ford v. Schliessman, 107 Wis. 479. It is thus apparent that some torts do and some do not, subject the perpetrator to liability to compensate the anguish and suffering which his wrongful act im-

poses upon the victim. Probably the line between them is not so accurately drawn that the location of every act on the one side or the other is always easy or free from doubt. It is obvious that in mere negligence there is no intent to offer indignity to, or wound the feelings of, another; and it may be legitimately said, as matter of law, that such result from mere inadvertence is so remote and beyond ordinary probabilities that there exists no proximate causal relation between the two, unless a physical injury is caused, out of which, in natural sequence, arises mental, like physical, pain. In Summerfield v. W. U. Tel. Co., supra, this court, by the pen of Mr. Justice Winslow, quoted approvingly from W. U. Tel. Co. v. Rogers, 68 Miss. 748, a classification of the torts other than negligence supporting recovery for mental suffering as an independent element, as follows: "Cases of willful wrong—especially those affecting the liberty, character, reputation, personal security, or domestic relations of the injured party." In Gatzow v. Buening, supra, it was said that the wrong there complained of, already described, did not fall within the above category. This was quite obviously true of the particular tort, to wit, the conspiracy to prevent the making or performance of a contract to supply a hearse for a funeral. In that there could be no intent to wound the feelings of plaintiff—he was not in the mind of the conspirators; and, if some such result was to be anticipated as possible, it would be quite as remote as from the mere act of breaking the contract. Such damage would be not the direct result of the conspiracy, but remote and consequential, like the disappointment resulting from breach of a promise to supply on time a wedding present or funeral flowers. The proximate causal relation between the conspiracy and the mental effect was lacking. Counsel seem to read that case as if it were one against Buening alone for his violence and force in physically preventing plaintiff from using the hearse, in abusive and turbulent manner, evincive of an intent to insult and outrage his feelings. Had that been the act complained of, we could hardly have said that it did not fall within the classification approved in the Summerfield Case, including willful wrongs affecting the "liberty," "security," or "domestic relations." In Ford v. Schliessman, supra, it was pointed out that an assault or technical imprisonment, though without physical contact, falls within the classification of the Summerfield Case, because "it invades the personal liberty and rights." Again, in Hacker v. Heiney,

supra, in discussing the contention that there could be no recovery for injury to feelings in absence of other actual damage, it was said: "The rule for which appellant contends has been applied only to cases of negligence or of alleged personal injury, where the mental suffering can result only from the injury, and not from the tort. It has never been applied to cases of malice, such as false imprisonment and slander." In Larson v. Chase, supra, the remarks of Mitchell, J., on this subject, are so philosophical that we cannot forbear quoting them. He says: "Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering; placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was that the act complained of was not an infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. * * * But where the wrongful act constitutes an infringement of a legal right, mental suffering may be recovered for, if it is direct, proximate, and natural result of the wrongful act." In Lombard v. Lenox, 155 Mass. 70, it is said: "If the ordinary and natural consequence of the tort is to cause an injury to the feelings of the plaintiff, and if the acts are done willfully or with gross carelessness of the right of plaintiff, damages may be recovered for mental suffering." Similar views are expressed by text-writers. 1 Sedgwick, Dam. (8th Ed.) §§ 43 to 47; 1 Sutherland, Dam. § 95 et seq.; 2 Kinkead, Torts, § 463.

These expressions from other courts are perhaps useful as indicating the philosophy involved in distinguishing between those torts which may and those which cannot be deemed to so proximately cause sense of outrage and mental suffering that the law will recognize such effect as an independent element of recoverable damage, whether resulting merely from some other injury, or directly from the tort itself; but they do not, in our judgment, vary or enlarge the field charted and delimited in the Summerfield Case, as above quoted. For the present case we are con-

vinced that sufficient guide can be found in the catalogue there promulgated. Certainly this complaint asserts a "willful wrong," not only in the sense that some injury to plaintiff's legal rights was intended, but also that an affront to his feelings was so certain to be caused by the defendant's act that the latter must be deemed to have intended that particular injury. We also think that, without undue stretch of meaning, the wrong complained of affects the "domestic relations"—otherwise called the relative rights—of plaintiff. The duty of surviving spouse, parent, or child to provide proper burial for the corpse springs from the relationship to the person deceased. The desire to perform such service is founded in that respect and affection entertained for the relative, of whom the body, it is true, is but the symbol, but, for the few hours after life ceases, seems so to still represent him who was, that acts of care and protection to it are still paid to such departed. Mr. Kinkead says, "The family tie takes us to the last resting place of our dead" (2 Torts, § 459), and therefore classes torts of the kind here presented as committed against the relative rights growing out of the domestic relations, like seduction or abduction of wife or child. Mr. Cooley likewise so classifies them. Torts (2d Ed.) p. 280. Recognition that duties arising in the domestic relation persist beyond death is not wanting in the law. Upon that idea is predicated the liability of the surviving husband for burial expenses incurred by a stranger for the body of his deceased wife, in strict analogy to necessaries furnished her in life. Bradshaw v. Board, 12 C. B. (N. S.) 344; Cunningham v. Reardon, 98 Mass. 538; Patterson v. Patterson, 59 N. Y. 583; Bishop, Husb. & W. § 566. Statutes providing temporary support out of an estate for widow and minor children unquestionably find their reason in the same conception. Doubtless other illustrations might be suggested, but these suffice to satisfy us that there is neither solecism nor unreason in the view that the right of custody of the corpse of a near relative for the purpose of paying the last rites of respect and regard is one of those relative rights recognized by the law as springing from the domestic relation, and that a willful or wrongful invasion of that right is one of those torts for which damages for injury to feelings are recoverable as an independent element. Apart from this view, however, we should deem it indisputable that the tort alleged is one "affecting the liberty" of plaintiff. The right to entomb the remains of his deceased mother in their integrity and

without mutilation, we have already decided, must be recognized as a legal one. The liberty of a member of a community governed by law is not merely freedom from actual imprisonment, but from obstruction of or interference with those acts which it is his right to do at will. State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530. An illustration is the right to vote, mentioned in some of the above-cited cases, with which the right alleged to have been invaded in this case seems to stand in complete analogy. We therefore conclude that the sense of outrage and the mental suffering resulting directly from the willful act charged on the defendant in this case are proper independent elements of compensatory damages. * * *

Order reversed and cause remanded, with directions to overrule the demurrer.

HADWELL *v.* RIGHTON.

L. R. 2 K. B. 1907, 345.

Plaintiff was riding a bicycle on a highway when he ran into three fowls belonging to defendant. A dog belonging to a third party frightened the fowls and one of them flew into the spokes of the wheel causing plaintiff to fall and damaging his bicycle and himself as well. The court held the damage too remote and plaintiff appeals.

PHILLIMORE J. I propose to rest my decision in this case upon Cox v. Burbidge, 13 C. B. (N. S.) 430, 436. The passage in that case to which I would specially refer is in the judgment of Erle C. J.: "To entitle the plaintiff to maintain the action it is necessary to show a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. . . . But even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an ani-

mal, and the owner knows it." In the present case the county court judge assumed that the fowls were unlawfully upon the highway as they were not using it for the mere purpose of passage either in the company of their owner or without him. Even if we adopt that assumption, was the damage which in fact happened of such a nature as was likely to result from their unlawful presence there? There was no antecedent probability that the fowl would be frightened by a dog, still less was there any probability that if so frightened it would fly into the spokes of a bicycle. The owner was not bound to contemplate such a result as likely to flow from his letting the fowls be at large upon the road. Even if the fowl was wrongly upon the highway it would have done no harm but for the wrongful act of the animal of a third person. In the course of endeavoring to avoid one danger it runs into another. And in such a case "*Causa proxima non remota spectatur.*" The negligence, if any, of allowing the fowl to be there was not connected with the damage. Apart from the action of the dog there was no evidence that fowls are in the habit of flying into passing bicycles.

So far I have assumed that the county court judge was right in treating the fowl as wrongfully upon the highway, but I cannot allow the case to pass without saying that I think the plaintiff's counsel have put too narrow a limitation upon the uses to which a highway may lawfully be put. It was said that the right of members of the public in a highway were confined to passing and repassing, and that animals, except when accompanied by their owners, had no right to be on the highway at all. In the first place, I think that members of the public, in addition to using it *eundo et redeundo*, are also entitled to use it *morando* for a short time. And I doubt whether, even with that addition, the lawful uses are thereby exhausted. For instance, if fowls are kept near a highway, and there is a corn stubble belonging to their owner on the other side of the road to which they might naturally and properly go, I am not prepared to say that to allow them to go there by themselves would be an unlawful use of the highway by their owner simply because they might while so doing run or fly into some one who was riding a bicycle.

Appeal dismissed.

Where in case of mining operations there has been a cave-in from failure of the miner to furnish surface support, the measure of dam-

ages is the actual loss the owners of the surface have sustained to the land and buildings thereon. The difference in market value before and after the injury is not the true rule in such cases. Noonan v. Pardee, 300 Pa. 474.

Where the tenant of leasehold land brings a suit for trespass resulting in the destruction of grass, the measure of damages is the value of the grass destroyed; that is the limit of the tenant's interest. Painter v. Stahley, 15 Wyo. 510.

A tenant for life leased land to an oil company, and the latter continued to take oil therefrom after the life tenant had died. The remainder man sued in trespass, and the court held that the measure of damages was the difference between what oil sells for in the market and the cost of production. Crawford v. Forest Oil Co., 208 Pa. 5.

The measure of damages for waste by removing timber from land is the diminished value of the land, not the value of the timber in its manufactured state. Nelson v. Churchill, 117 Wis. 10. See also Charles v. Clearfield Lumber Co., 209 Pa. 422.

In an action of trespass for forcibly excluding plaintiff from fishing for salmon in public waters near Tanglefoot Beach along the shore of Alaska, where a verdict of $14,000 was recovered, the court held it error to exclude testimony as to the motive of defendant. Pacific S. W. Co. v. Alaska Packers Asso., 138 Cal. 632.

Where defendant commits a trespass on land, and seizes growing crops, and does this in good faith, believing he has title, the measure of damages is the value of the crop at the time of the trespass. And where plaintiff is ousted of land having growing crops, the measure of damages is the difference in rental value of the whole leasehold and the part unlawfully seized. Irwin v. Solde, 176 Pa. 594.

Where the owners of a hotel construct the same so as to render an adjoining house untenantable, and plaintiff moves out, he can recover against the contractor for discomfort, cost of storage of furniture and increased cost of living. McFadden v. Thompson, 116 App. Div. N. Y. 285.

Determination of cost is not a determination of value. To determine value of growing crops see Teller v. Bay & River Dredging Co., 151 Cal. 209.

For destruction of shade trees the only way of estimating damages is to consider the lessened value of the land. If the injury be wanton, punitory damages may be awarded. Gilman v. Brown, 115 Wis. 1.

So, too, in waste, the question is as to the diminished value of the land. Nelson v. Churchill, 117 Wis. 10.

Where the government sues timber thieves for stealing on the public domain, the value of the timber unlawfully cut is the measure of damages. U. S. v. St. Anthony R. R. 192 U. S. 451.

Where a mining company, through trespass, injures plaintiff's springs, the permanent depreciation of the realty measures the damages—the difference in market value before and after the trespass. Rabe v. Schoenberger Coal Co., 213 Pa. 252.

Cost of restoring a building injured by trespass may be measure of damages where it is a small sum and less than the amount of depreciation. Bates v. Warrick, 71 Atl. Rep. 1116.

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3. *Trover and Conversion.*

FORSYTH *v.* WELLS.

Pennsylvania, 1861. 41 Pa. 291.

The plaintiff declared in trover for mining and carrying away coal from her lands, to which the defendant pleaded not guilty.

LOWRIE, C. J. We are to assume that it was by mistake that the defendant below went beyond his line in mining his coal, and mined and carried away some of the plaintiff's coal, and it is fully settled that for this trover lies. 3 S. & R. 515; 9 Watts, 172; 8 Barr, 294; 9 Id.. 343; 9 Casey, 251.

What, then, is the measure of damages? The plaintiff insists that, because the action is allowed for the coal as personal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done.

Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office.

Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of personal property lost by one and found

by another, and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for outrage and malice in the taking and detention of them. 6 S. & R. 426; 12 Id. 93; 3 Watts, 333. Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus. 1 Jones, 381. And so does trespass. 7 Casey, 456.

In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained, without giving up any claim for any outrage or violence in the act of taking. 3 Barr, 13. It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice, the just value of the property is enough. 11 Casey, 28.

When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary; because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation; but only to give him a more convenient form for recovering that much.

Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries; and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially the very learned and thoughtful opinions in the case of Silsbury v. McCoon, 4 Denio, 332, and 3 Comst. 379, warn us to be careful how we express ourselves on that subject.

We do find cases of trespass, where judges have adopted a mode of calculating damages for taking coal, that is substantially equivalent to the rule laid down by the Common Pleas in

this case, even where no wilful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then, we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out just compensation. 5 M. & W. 351; 9 Id. 672; 3 Queen's B. 283; and see 28 Eng. L. & E. 175. We prefer the rule in Wood v. Morewood, 3 Queen's B. 440. n., where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal-field had been purchased from the plaintiffs. See also Bainbridge on Mines and Minerals, 510; 17 Pick. 1.

Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill, 425 and note; 21 Barbour, 92; 23 Conn. 523; 38 Maine, 174.

Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for mesne profits. 7 Casey, 456.

Judgment reversed, and a new trial awarded.

READ, J., dissented.

GROAT *v.* GILE.

New York, 1873. 51 N. Y. 431.

In May, 1864, defendants sold a lot of sheep and lands to the plaintiffs. At the time of the sale, the sheep were in two fields, and were examined by plaintiffs who bought the whole, excepting two bucks and a lame ewe, at $4.00 a head. Plaintiffs paid $25.00 on account, and agreed to take them away a few months later. Before they were taken away, the defendant sheared the sheep and converted the wool to his own use.

A verdict was directed for plaintiffs but was set aside by the General Term of the Supreme Court.

LOTT, Ch. C. As the verdict at the circuit in favor of the plaintiffs was ordered by the judge who tried the action on the version given by the defendant of the contract or agreement between the parties, it becomes necessary to refer to it with particularity for the purpose of ascertaining whether his conclusion of law based thereon was correct.

The defendant, on his direct examination, after stating that the plaintiffs called on him about the 20th of May, 1864, and that he and the plaintiff Groat had some conversation about the purchase of his sheep and lambs, in which he said that he wanted to sell the old sheep with the lambs, and that he would ask four dollars apiece for them, testified as follows: "They concluded to go and see the sheep; I told them where they were; one flock was near a mile from the house; they went off together; went to the further lot first; when they came back from this lot I told them where the others were; I told them I did not believe they would like that lot; they did not look as well as the others, as some of them had lost their wool; then they went off to see the other lot and came back; they asked me how many sheep and lambs there were; I told them I could not tell how many there were; I did not know myself; I think I said in the neighborhood of so many sheep and so many lambs; then they inquired about taking the sheep; it was agreed that they should take the lambs the middle of September and the old sheep the first of November, and pay me four dollars apiece for sheep and lambs; this was the contract; I think I told them I would give them a good chance; something was said about cutting the lambs' tails off; I told them I thought it was not prudent; I tried to dissuade them from having it done; that they

had got too large and might die; something was said in answer to it, but I don't know just what; they asked me if the sheep were sound after they had been to see them; I told them I did not consider them entirely sound; then they asked that I should doctor the sheep if they needed it; I told them I would; after the talk they handed me over twenty-five dollars to bind the bargain, as they said; then they went away." On his cross-examination, he said: "When Groat and Jacobia were there in May, I had sheep in two lots: the sheep I sold them were in the lots mentioned; I sold them all that were in these lots; did not know how many sheep I had; had not counted them for some time; sometimes they die; told them I did not know how many I had; that there would be in the neighborhood of ninety old sheep; they were to take all the sheep in the two lots, except two bucks and a lame ewe; they got all the sheep in the two lots except two bucks and a lame ewe; they agreed to give four dollars per head; in the bargain they were to have all the sheep except two bucks and a lame sheep; I agreed to sell the sheep at that price; nothing was said about the wool; they got ninety-two old sheep and seventy-one lambs." And on further redirect examination he said: "When they made the contract for these sheep, there was nothing said about the wool." And also: "Some of the lambs came in March, and so along, and some were only a few days old; some time in August is the usual and proper time for taking lambs from sheep; they had not been separated from the sheep on the nineteenth of May; the lambs were in no condition to be separated from the sheep, at that time, without ruining the lambs."

The preceding statement of the defendant's evidence contains all that relates to the negotiation and making of the agreement, and fully justifies the construction given to it by the learned judge at the circuit. It is clear that the plaintiffs intended to buy of the defendant, and that it was his intention to sell them all of the sheep and lambs that were running in the two lots of land referred to by him (except two bucks and a lame ewe, as to the identity of which there was no question), at four dollars per head, and that no further or other designation or selection was contemplated. All the parties understood what particular sheep and lambs were intended to be sold, and there is no doubt that these were sufficiently identified. Indeed, that fact does not appear to have been disputed on the trial. Under such circum-

stances, when the terms of the sale were agreed on and the payment of twenty-five dollars was made to the defendant on account of the purchase-money by the plaintiffs, their liability became fixed for the balance, which was ascertainable by a simple arithmetical calculation based upon a count of the sheep and lambs and the price to be paid per head for them. No delivery of them or other act whatever in relation to them by the defendant was required or intended. The plaintiffs were to take them without an agency in delivering them on the part of the defendant, and they, from the time the agreement was made, became the owners thereof. The defendant subsequently kept them at the risk of the plaintiffs. Chancellor Kent, in his Commentaries, vol. 2, p. 492, in stating the rule governing sales at common law, says: "When the terms of sale are agreed on and the bargain is struck and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer." This rule is modified by our statute of frauds so far as to require, in certain cases, that a note or memorandum of the contract shall be made in writing and subscribed by the parties to be charged, or that the buyer shall accept and receive a part of the property sold, or at the time pay some part of the purchase money; and in such cases, he says, at p. 499: "When the bargain is made and is rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisition of the statute of frauds, the property, and with it the risk, attach to the purchaser; but though the seller has parted with the title, he may retain possession until payment." The fact that the number of the sheep and lambs sold was not ascertained at the time the terms of sale were agreed on did not prevent the application of the rule referred to in this case. It is true that the same learned jurist, after stating that "it is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if goods of different values be sold in bulk and not separately and for a single price, or *per aversionem*, in the language of the civilians, the sale is perfect and the risk with the buyer," adds, "but if they be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller until the specific property be separated and identified." The present case is not one of the latter class. That rule has reference to a

sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of ascertaining the total value thereof at certain specified rates or a designated fixed price. This distinction is recognized in Crofoot v. Bennett, 2 Comst. 258; Kimberly v. Patchin, 19 N. Y. 330; Bradley v. Wheeler, 44 id. 495. The sale in question was in fact of a particular lot of sheep and lambs, and not of a certain undesignated number to be selected and delivered at a future time, and the postponement of the time for taking them away did not prevent the title passing to the plaintiffs.

A sale of a specified chattel may pass the property therein to the vendee and vest the title in him without delivery. (See Chitty on Contracts, 8th American ed., p. 332, and Terry v. Wheeler, 25 N. Y. 520.)

All the parties appear to have understood the transaction, at the time it took place, as a present absolute sale and change of title. What was said about cutting the lambs' tails off and doctoring the sheep, if they needed it, is evidence of such understanding, and there is nothing in what is said to have been the agreement about taking them away inconsistent with it. That gave the plaintiffs the privilege of leaving them in the defendant's pasture till the time specified for taking them away, but did not deprive them of the right to take them before, if they chose to do so. The remark of the defendant at the time to the plaintiffs, that he "would give them a good chance," shows that such was its object and intention. It is proper, moreover, to consider the statement in reference to such agreement in connection with what had been previously testified to by the plaintiffs, and which was not denied by the defendant, and therefore impliedly admitted, to the effect that Groat, one of the plaintiffs, before going to look at the sheep and lambs, had stated to the defendant that he had no pasture for them, to which he replied that he had lots of pasture and would keep them for the plaintiffs if they purchased, and that they, after looking at them, had stated to him that they would take them at the price named, if the parties could agree upon the time for keeping them. Considered in that connection, it is clear that the agreement was one for the plaintiffs' accommodation and an inducement to them

to make the purchase at the price asked, which had been fixed irrespective of their subsequent pasturage on the defendant's land. It affords no ground or warrant for saying that the defendant, during the time they were so kept, intended to assume and bear all risks incident to a continuance of his ownership of them, and consequently that the purchase-money receivable by him should depend on the number that should be living at the time specified or limited for that purpose. On the contrary, the fact that the price at which they were sold, was that named by him when the first application to him to sell them was made, without reference to the question of the future keeping of them in his pasture, and the other circumstances attendant on the transaction, as stated by him, clearly shows that such was not his intention.

It follows, from what has been said, that there was no error in the ruling of the judge that the title to the sheep passed to the plaintiffs immediately upon the completion of the contract and the payment of the twenty-five dollars by them. That necessarily carried with it the right to the wool on them, it being shown that there was no reservation thereof or anything said about it during the negotiation or at the time the contract was made. It is not a mere presumption, as stated in the prevailing opinion in the Supreme Court, that the parties "intended, in the absence of evidence to the contrary, that the title to the wool should follow the title to the sheep." As was well said by Justice Ingalls in his dissenting opinion: "When the sheep were sold the wool was grown and was a part of the sheep, adding to their value," and there is no reason or principle for saying that such particular part did not pass to the purchaser with the rest of the animals. The sale was of the entire animal and not of different parts or portions constituting it, or of what it was formed.

Assuming, then, that the legal effect of the agreement of the parties, as testified to by the defendant himself, was to vest the title to the wool in the plaintiffs, it was clearly incompetent to show a custom in Columbia county where the transaction took place, that the wool of sheep sold, under the circumstances disclosed, does not go to the purchaser. (See Wheeler v. Newbould, 16 N. Y. 392, 401; Higgins v. Moore, 34 id. 417; Bradley v. Wheeler, 44 id. 495.)

There were several offers of evidence by the defendant which were rejected by the court. Among them were the following:

1st. That the plaintiff, Groat, on a previous occasion, purchased a number of sheep and lambs of the defendant under an arrangement precisely similar to the present, and that he did not claim the wool; 2d. That the plaintiffs admitted to a witness, on being offered $100 for their bargain with the defendant and to take the sheep and lambs off their hands, allowing the defendant to have the wool, refused the offer and said that the sheep, without the wool, were worth more money than the offer; and 3rd. That the plaintiff, Groat, admitted that he did not understand he had bought the wool in question, or think of making any claim to it until his co-plaintiff suggested that they could hold it.

These were properly excluded. It was immaterial to the present controversy what the plaintiffs, or either of them, had claimed of the defendant under a previous sale. Their legal rights could not be controlled under the present contract by a failure to demand what they were entitled to under a previous one, and it cannot be held that the wool, under this agreement, was excepted from the operation of the sale, because one of the plaintiffs did not assert his rights under another, and it could not aid in determining what the contract in dispute was, whether or not the purchase of the sheep was so profitable as to cause the plaintiffs to reject the offer made them for their bargain. Nor could the understanding of one of the plaintiffs, as to the question whether he had bought the wool or not, alter the effect of the transaction or the contract actually entered into. What he in fact did buy was the question, and that did not depend on what he understood, but on the agreement. The defendant was also asked what was the value of the sheep without the wool under the arrangement he had testified to. That question was properly excluded; the inquiry was wholly irrevalent. The parties could make such agreement as they saw fit, and it was immaterial whether the defendant sold the property in question for more or less than it was worth, in the absence of any fraud or other evidence affecting its validity.

There was a request to charge the jury that if the statement of the defendant was correct, then the sum of $25.00 paid by the plaintiffs was merely paid to bind the bargain and take the contract out of the statute of frauds, and that the title to the sheep did not thereby pass absolutely to the plaintiffs. This was refused, and what has already been said as to the legal effect of that statement, shows that such refusal was correct.

The court was then asked by the defendant to submit the following questions to the jury:

1st. Whether the contract in suit was executed or executory; whether it was the intention of the parties that the title to the sheep should pass to the plaintiffs immediately upon the making of the contract or at some future period.

2d. Whether the defendant, upon the making of this contract, intended to sell or the plaintiffs to buy the wool in question in this suit; and on his refusal so to do, and after proper exceptions were taken, he was requested to charge the jury that if the contract was executory and it was not the intention to pass the title to the sheep until delivery and payment, then the wool sheared from the sheep, before they were actually deliverd and paid for belonged to the defendant. This was also refused and an exception was taken to such refusal.

There was no error to submit those questions or give that instruction to the jury. They all involved the submission of matters of law to their consideration and determination. The court had previously decided that the terms, nature and effect of the contract should be determined and controlled by the defendant's statement, or version of it, which was the most favorable view in which it could be considered for him. The case was thus substantially one in which there was no dispute of facts as to the terms of the agreement, and it therefore became a question of law to be determined by the court whether the contract was executed or executory, and what was the intention of the parties (to be ascertained from the contract) as to the nature, extent and effect of the sale.

The only remaining question to be considered relates to the rule of damages laid down by the court, which he stated to be "the highest market price of wool between the time of the demand and the time of trial, with interest from the time of the demand."

It may be questionable whether the instruction as to the right to recover interest is correct; and I understand, from the points of the counsel of the defendant, that he only makes objection on this appeal to that portion of the charge. That question was not presented by his exception, which was to the entire instruction and not to the allowance of interest only. The part allowing a recovery for the highest market value between the conversion and the time of trial, was held by us in Lobdell v. Stowell,

(decided at the September term, 1872, to be the proper rule or measure of damages or compensation, on the authority of Romaine v. Van Allen, 26 N. Y. 309; Burt v. Dutcher, 34 id. 493; Markham v. Jaudon, 42 id. 235). There was, therefore, no ground of complaint to that portion of the charge. The exception being to that as well as to the portion relating to the interest was too broad and consequently not well taken, and is not available as a ground for setting aside the verdict in favor of the plaintiffs and granting a new trial.

The result of the views above expressed is, that the order of the General Term granting such new trial should be reversed, and judgment must be ordered against defendant on the verdict with costs.

All concur.

Order reversed and judgment accordingly.

BATEMAN *v.* RYDER.

Tennessee, 1901. 106 Tenn. 712.

WILKES, J. This is an action of trover brought by a mother against her daughter and her husband for the conversion of a guitar, four pictures, and a trunk containing clothing and manuscripts of prose and poetry composed by the plaintiff's former husband.

The action was commenced before a justice of the peace, and the damages were laid at $500. There was a trial before the court and a jury, on appeal from the justice, when there were verdict and judgment for $200, and defendants have appealed to this court.

The first three assignments go to the measure of damages.

Testimony was admitted to show a special value to plaintiff of the articles because they were gifts from her former husband, and because of the associations connected with them. It is said this was erroneous.

It is said the court charged the jury that, in fixing the value of the property, they should consider the plaintiff's relations to the same.

What the court did charge on this point was "that the jury must determine from all the evidence on that point what would

be a fair and reasonable value for the property, considering plaintiff's relation to the same and the rights of property."

The court, upon request, refused to charge that, the action being in trover for the conversion of property, the measure of damages was the actual value of the property.

These assigments may all be treated together.

In actions of trover for the conversion of personal property, as a general rule the measure of damages is the market or actual value of the property at the date of the conversion. 26 Am. & Eng. Enc. Law, 818, and authorities there cited. But damages beyond the actual value of the property converted have been allowed the plaintiff when he has been subjected to some special loss or injury. 26 Am. & Eng. Enc. Law, 849. "One criterion of damages is the actual value to him who owns it, and this is the rule when the property is chiefly or exclusively valuable to him; such articles, for instance, as family pictures, plate, and heirlooms. These should be valued with reasonable consideration of, and sympathy with, the feelings of the owner." 3 Sutherland on Damages p. 476; Suydam v. Jenkins, 3 Sandf. (N. Y.) 620; Spicer v. Waters, 65 Barb. (N. Y.) 227.

In Hale on Damages p. 182 § 76, it is said: "When property has a peculiar value to the owner, such as it has to no other person, or when it cannot be exactly replaced by other goods of like kind, the actual value to the owner, and not the market value, is the measure of compensation."

The testimony shows that the four pictures were oil paintings bought in Italy by the plaintiff's husband at a cost of $500, and presented to her while traveling, and were valuable intrinsically as well as from association; that the original cost of the guitar was $50, and it was highly prized for its associations; that there was some considerable clothing in the trunk, besides a lot of manuscript productions, in prose and verse, of plaintiff's husband, which had never been published, and probably could not be reproduced. There is evidence, on the other hand, that the pictures were not well preserved; that their frames were dilapidated; that they would probably bring about $20 at auction, and that the guitar would perhaps sell for $5; that the clothing was worn and old, and of no real value; and that the manuscripts were of no value whatever. We think the court gave the proper instructions as to the feature of damages, and, while we would have been

better satisfied with a smaller judgment, there is ample evidence to support the amount given. * * *

The judgment of the court below is affirmed with costs.

BARKER *v.* LEWIS.

Connecticut, 1905. 78 Conn. 198.

Appeal from Court of Common Pleas, New Haven County.

Action for conversion of household furniture and personal effects. From a judgment for plaintiffs, defendant appeals.

PRENTICE, J. The plaintiffs delivered to the defendant, as a warehouseman, for storage, certain household furniture and personal effects. This action was brought to recover damages for conversion. Judgment having been rendered for the plaintiffs upon the verdict of a jury, the defendant appealed; assigning various reasons of appeal, which, after elimination and consolidation, are in its brief reduced to four claims of error. The most comprehensive and important of these involves a consideration of the rule for the assessment of damages. The property in question included, as was claimed, certain family records, pictures, photographs, heirlooms, and other articles of peculiar value to the plaintiffs. With respect to these articles the court gave instructions in the language of Green v. Boston & L. R. Co., 128 Mass. 222, 35 Am. Rep. 370, of which no complaint is made. The remaining property was household furniture and effects, including books, all claimed to have been purchased by or presented to the plaintiffs when new for use by them in housekeeping, and in fact so used by them in their home in New Haven until the time that they were stored with the defendant upon the occasion of their having temporarily broken up housekeeping to go into the country. The defendant claimed that the measure of the plaintiffs' recovery for these articles was their fair market value at the time and place of conversion, with lawful interest since that date. It asked the court to so charge, and sought by the introduction of evidence to show that there was a secondhand market for such things in New Haven, and presumably, although no definite offer was made, to follow up that line of inquiry by offering evidence of some sort claimed to show the value of articles of the kind in question in such market. The

court was correct in refusing to instruct the jury as requested, and in excluding said testimony.

The cardinal rule is that a person injured shall receive fair compensation for his loss or injury, and no more. Baldwin v. Porter, 12 Conn. 473. Commonly in cases of conversion the loss is the value of the property. Baldwin v. Porter, *supra*. Commonly the value of the property, as representing the owner's loss, is its market value, if it have one, since thereby is indicated the cost of replacing. Hence the subordinate rule of general application appealed to by the defendant. But the principal rule, which seeks to give fair compensation for the loss, is the paramount one; and ordinarily, when the subordinate one fails to accomplish the desired result, it yields to an exception or modification. Sutherland on Damages, §12. It is now generally recognized that wearing apparel in use, and household goods and effects owned and kept for personal use, are articles which cannot in any fair sense be said to be marketable and have a market value, or at least a market value which is fairly indicative of their real value to their owner, and of his loss by being deprived of them. So it has been frequently, and we think correctly, held that the amount of his recovery in the event of conversion ought not to be restricted to the price which could be realized by a sale in the market, but he should be allowed to recover the value to him based on his actual money loss, all the circumstances and conditions considered, resulting from his being deprived of the property; not including, however, any sentimental or fanciful value he may for any reason place upon it. Denver, etc., R. Co. v. Frame, 6 Colo. 385; McMahon v. City of Dubuque, 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143; Int. Ry. Co. v. Nicholson, 61 Tex. 553; Fairfax v. New York C. & H. R. Co., 73 N. Y. 167, 29 Am. Rep. 119; Sell v. Ward, 81 Ill. App. 675; Joyce on Damages, § 1037; Sutherland on Damages, § 1117; Sedgwick on Damages, § 251.

The court in one portion of its charges stated this rule to the jury in substance, in so far, at least, as was required by any claim on the part of the plaintiffs. In another place, however, it was less careful in its language, and, while doubtless intending to express the same principles elsewhere stated, it used the following language: "The measure of damages in this case, gentlemen, relates to the actual value of the property at the time of its conversion; and that is to be determined from the cost of the prop-

erty, the extent to which it has been used, and its condition at the time of the conversion." This was an altogether misleading statement. It selected three of the many factors which might enter into the consideration of the question of fair compensation, made them the sole and decisive ones, and ignored all others. Under such instructions a jury might well go far astray, and we are unable to say, from a study of the charge as a whole, that the error here committed was elsewhere corrected so that the jury approached the inquiry as to the amount of damages to be awarded with a correct understanding of the law.

The case of Sanford v. Peck, 63 Conn. 486, 27 Atl. 1057, is relied upon by the defendant as supporting its contention that the market value furnishes the measure of recovery in cases of this character. The question here made was not presented or passed upon in that case. The plaintiff claimed to recover the market value and his right to do so was conceded. The question adjudicated was one as to the admissibility of certain evidence as probative of the market value.

The complaint alleges that the defendant converted the property in question to its own use and sold the same without authority from the plaintiffs and unlawfully. The defendant contends that the plaintiffs by this averment restricted their right to prove a conversion to one by a sale, and complains of the instructions of the court to the effect that one might be established by proof of either an unlawful sale or a demand for a return and a refusal. The instructions were correct.

As a new trial must be granted, the remaining complaints of error do not require attention.

There is error, and a new trial is granted. All concur.

WHITE *v.* YAWKEY.

Alabama, 1896. 108 Ala. 270.

This was an action of trover, brought by appellee against the appellants, to recover damages for the conversion by them of certain timber, alleged to have been cut from the land of the plaintiff. Defendants plead that the conversion was innocent and unintentional.

HEAD, J. The case was tried in the lower court upon the second count of the complaint, which was in trover, and claimed

damages "for the conversion of 100 pine logs cut and taken away" from the lands of the plaintiff. The material facts are that, within a year prior to the commencement of the suit, one Jack Brewer cut the pine logs from the timber lands belonging to the plaintiff, and sold them to the defendants to be delivered on the banks of Pea river, where he did in fact deliver them; and that neither he nor the defendants knew at the time the cutting was done that trespasses were being committed on the plaintiff's property, this fact not having been discovered until a survey was made, some time after the acts complained of had been performed. The defendants disposed of the logs, which were worth four cents per foot, at Pea river. * * * With a view to mitigating the damages, the defendants offered to prove the value of the logs prior to their removal from the land, accompanying the offer with the statement to the court that they expected to prove the logs were worth materially more after being transported to and placed on the banks of Pea river than they were before such removal. The court refused to allow this proof to be made, and to the ruling an exception was duly reserved. This presents the single question of merit to be decided upon the appeal.

It will be observed from the foregoing statement, that the record makes the case of a conversion by purchasers, innocent of wrongdoing, from an inadvertent trespasser, who, by the expenditure of time, labor, and, doubtless, money, had enhanced the value of the pine logs, after their severance from the freehold and transformation into chattels. The effect of the ruling of the circuit court was to exclude from the jury all evidence upon the subject of value, except that confined and limited to the place of delivery to the defendants, and thereby to necessitate a verdict for the value at that place, as being the only authorized measure of damages, justified by the facts of the case. * * * It is sufficient to say that the modern authorities are practically unanimous in holding that the rule of just compensation for the injury sustained, which is the ideal measure of actual damages, does not require the assessment, against an inadvertent trespasser, of the accession to the value of a chattel which his labor has produced, but that he is entitled to an abatement therefor from the enhanced value. (Citing authorities.) The same rule prevails when trover is brought against the unintentional trespasser's innocent vendee, who is treated

as standing in the shoes of his vendor. (Citing authorities.)

It is no answer to this to say that the plaintiff might have brought detinue for the logs wherever he might have found them, short of a change of identity, and thereby have recovered them in specie after their value had been enhanced. In detinue the title prevails, and the question of damages is not considered. If a party aggrieved elects to bring the equitable action of trover, the assessment of damages may be so adjusted as to compensate the plaintiff for his injury, without paying him a premium, or depriving an innocent party of that which he has in good faith added to the chattel. Weymouth v. Railway Co., 17 Wis. 550, 84 Am. Dec. 763. The rule is different if the trespass is wilful or in bad faith. (Citing authorities.)

The authorities do not agree upon the question whether, in trover against an inadvertent trespasser, or his innocent vendee, for severed portions of the realty, the rule is to allow the value of the property in place, as if it had been purchased in situ by the defendant, at the fair market value of the district—as, for instance, the value of timber standing, or, for coal or ore mined, the value in place—or whether the value to be taken as the basis of recovery is that of the property converted immediately after severance, when it becomes a chattel. The case of Wood v. Morewood, 3 Q. B. 440 (which is regarded as conflicting with the earlier English cases), is the leading English, and Forsyth v. Wells, 41 Pa. 291, 80 Am. Dec. 617, subsequently criticised in that state, is one of the leading American cases supporting the rule first stated, and they have been frequently followed. Many cases which are often cited in favor of the same rule may be distinguished by noting that they were not actions of trover, or that they arose in states which have abolished forms of action, or that the decisions were made in proceedings in equity where the courts were not influenced by the technical rules governing the various common-law actions. In this state, forms of action have not been abolished, and parties must be here held to the legitimate and logical consequences of the particular action which has been instituted.

Trover is brought for the conversion of personal property, and it would seem incongruous to say that the damages could be assessed upon the principle adopted in actions of trespass *quare clausum fregit*, when the gravamen of the complaint is essentially different. Cases can be easily perceived in which the

value of the timber after severance would very inadequately compensate the owner for the trespass. This would be so when the trees were prematurely cut, or were valuable for shade and fruit. Under such circumstances, he may accommodate his selection of a form of action to the necessities of the case, and bring trespass for entering his land, and severing and removing timber or trees, in which case he would recover, as actual damages, the diminished value of the land, or, to state it more definitely, the value of the trees standing and any injury to the freehold by reason of their removal. (Citing authorities.)

When trover is brought, the trespass upon the land is, so to speak, waived or disregarded; and when brought for the conversion of logs or trees as chattels, under the circumstances of this case, the true rule, in our opinion, is the second above stated; according to which the value immediately after severance, with interest, furnishes the proper measure of recovery. (Citing authorities.)

The circuit court erred in rejecting the proffered proof. * * *

For the error in rejecting the evidence designed to mitigate the damages, * * * *the judgment is reversed and the cause remanded.*

WALLINGFORD *v.* KAISER.

New York, 1908. 191 N. Y. 392.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action against sheriff of Erie county. From a judgment of the Appellate Division, affirming a judgment for plaintiff, the defendant appeals.

WILLARD BARTLETT, J. The only question which we consider it necessary to discuss in passing upon this appeal relates to the measure of damages adopted by the trial court. The action was for the conversion of a number of horses which were seized by the defendant, assuming to act under a warrant of attachment issued to him as sheriff of Erie county; the animals having been taken from a railroad train at East Buffalo while in course of transportation from Chicago, Ill., to Liverpool, England. The learned trial judge instructed the jury that, if the plaintiff was

entitled to recover at all, he was entitled to recover the value of the horses in Liverpool, less the expense of transporting them and putting them on the market in Liverpool for sale and selling them. No exception was taken to this instruction; but counsel for the appellant had previously disputed the correctness of the rule thus laid down for ascertaining plaintiff's damages by objecting to a question as to the value of one of the horses in Liverpool at the time that it would have arrived there in due course of transportation, and taking exception to the decision of the court in overruling that objection, the court having stated at the time that one objection to like questions was sufficient and that the defendant need not object to each like question.

In actions for conversion, and actions of a similar character, the general rule is that the value of the property at the place of conversion is the correct measure of damages. 2 Sedgwick on Damages (8th Ed.) § 496; Tiffany v. Lord, 65 N. Y. 310; Parmenter v. Fitzpatrick, 135 N. Y. 190; Fleischmann v. Samuel, 18 App. Div. 97; Hamer v. Hathaway, 33 Cal. 117. But this rule is subject to important qualifications and exceptions. Among these may be mentioned (1) cases where there is no market value for such or like property at the place of conversion. In that event resort is had to evidence of market value at the nearest place where there is a market. Keller v. Paine, 34 Hun. 167, 176. This may be as far removed as San Francisco is from the Isthmus of Panama (Harris v. Panama R. R. Co., 58 N. Y. 660), or halfway around the earth (Bourne v. Ashley, 1 Lowell, 27, Fed. Cas. No. 1,699). The case last cited was a libel in admiralty by the owners of one whaling ship against the owners of another, both vessels hailing from New Bedford, for the conversion of a whale in the Okhotsk Sea. There being no market price for whales at the place of conversion, the court held that the libelants were entitled to the value of the oil and bone at New Bedford, which was the controlling market of the country as well as the home port of both the whalers, less the expense of taking the oil and bone out of the whale and getting it to such port. (2) A second class of cases, constituting an exception to the rule that the value of the converted article at the place of conversion is ordinarily the true measure of damages, are actions against common carriers, where the goods are lost, destroyed or damaged in transit, in which the damages recoverable against the carrier are based on the market value at the point of destination. 2 Sedg-

wick on Damages (8th Ed.) § 844; Mayne on Damages, 285; Sturgess v. Bissell, 46 N. Y. 462; Holden v. N. Y. C. R. R. Co., 54 N. Y. 662.

So far as I have been able to ascertain, the precise question presented by this appeal does not appear to have been determined in this state; that is, whether, where property in the custody of a common carrier in the course of transportation is converted by a stranger, the owner's right of recovery is limited to the market value at the place of conversion, or nearest market, or may be measured by the market value at the place of destination, less the cost of conveyance thither and the selling expenses. That the latter is the only just rule was strongly suggested in Suydam v. Jenkins, 3 Sandf. 614, 622, by Duer, J., in the course of what was pronounced an "extremely able opinion" by Rapallo, J., in Baker v. Drake, 53 N. Y. 211, 224. Judge Duer said: "When the market value is justly assumed as the measure of value, there are numerous cases in which the addition of interest would fail to compensate the owner for his actual loss. It may be shown that, had he retained the possession, he would have derived a larger profit from the use of the property than the interest upon its value, or that he had contracted to sell it to a solvent purchaser at an advance upon the market price, *or that, when wrongfully taken or converted, it was in the course of transportation to a profitable market where it would certainly have arrived;* and in each of these cases the difference between the market value when the right of action accrued, and the advance which the owner, had he retained possession, would have realized, ought plainly to be allowed as compensatory damages, and as such be included in the amount for which judgment is rendered." The view of Judge Duer, as expressed in the passage which I have emphasized by italics, was adopted by the Supreme Court of Missouri in a well-considered case decided in 1860. Farwell v. Price, 30 Mo. 587. Referring to the rule, as to which some doubt then existed, but which is now well established, that the measure of damages in the case of a conversion by the common carrier is the market value at the point of delivery, the court went on to say: "And where the wrongdoer is a mere stranger, a trespasser, it is not easy to see upon what ground he can insist that the value of the property at the place where the conversion occurred shall be the measure of damages to which the owner is entitled. Such a rule would in effect force the owner to dispose

of his property in a market not of his own selection, and one where, perchance, the property might be valueless." In that case the property consisted of flour consigned from St. Louis to Boston, and was converted en route by the forwarding agent at New Orleans. "Going no further for illustration than the case under consideration, we see, as a matter of fact, that the market value of flour at New Orleans is not at all times the same as at Boston, minus the cost of transporting it from one point to the other, though doubtless any considerable disparity could not long continue. Scarcity of capital or other circumstances may depress the price of an article in one market below its value in another, after deducting the expense of removing the article, though in the present condition of trade this could not continue long. But as the price of an article must mainly be regulated by its value for home consumption, and must be so altogether if there is no capital engaged in its removal to other places, the price at the place of conversion would in most instances prove an inadequate compensation for the loss sustained by the owner."

This last proposition seems strictly correct as applied to the proof in the case at bar, which showed that the horses taken from the railway train by the sheriff had been selected at great pains and with special care in reference to the demand in the Liverpool market. As may be inferred from what has already been said, I think there is and ought to be an exception to the general rule in trover that the value of the property at the place of conversion is the owner's measure of damages in the case of goods converted by a stranger at an intermediate point while in the course of transportation, and that where the property when wrongfully taken is on the way to a profitable market, where it would certainly have arrived, the owner is entitled to recover the value of the goods at the place of destination, less the cost of carriage and the cost of effecting a sale in that market. The purpose of the law is to afford just and reasonable compensation to the injured party for the natural and proximate consequences of the wrongful act; and this can hardly otherwise be accomplished in such a case as that which we have presented for our consideration here. The special damage which the plaintiff claimed to have sustained by reason of his inability to sell the horses in Liverpool was distinctly alleged in the complaint; and the defendant's lack of information as to the particular destination of the animals is not available to him in mitigation. See Lath-

ers v. Wyman, 76 Wis. 616. The circumstances under which the horses were taken constituted notice that they were destined for some point beyond East Buffalo.

The appellant relies upon the cases of Brizsee v. Maybee, 21 Wend. 144, and Spicer v. Waters, 65 Barb. 227; but in neither of those cases was the property converted while in the course of transportation. The Brizsee Case was an action of replevin for a quantity of saw logs which were replevied at the mills of the defendant in Niagara county. The defendant was allowed to prove what would have been the value of the stuff made from the logs in the Albany and Troy markets at the time when it would in the ordinary course of business have reached those cities. The old Supreme Court, per Cowen, J., held that the ultimate value at Albany or Troy, when in the ordinary course of business the boards would reach there, deducting the expense of manufacturing and the price of transportation, was a proper topic of inquiry, with a view of ascertaining the value of the saw logs at the place where they were replevied, but not for any other purpose. In the Spicer case there was a conversion of lumber in Lewis county, and the trial judge charged the jury that if the lumber was to be taken thence to the Troy market, and there to be held in the plaintiff's lumber yard, they were entitled to recover its market value in Troy, less the cost and risk of transportation. The General Term of the Fifth District (Mullin and Morgan, JJ.; Bacon, J., dissenting) held that this charge was erroneous, in view of the general rule that in an action for the conversion of personal property the measure of damages was the market value at the time and place of conversion, with interest up to the time of trial. The prevailing opinion shows that the court deemed the decision in Brizsee v. Maybee, *supra*, controlling on the question, although, as already suggested, that was not a case of the conversion of goods in transit.

I find nothing in the reasoning or decision of these cases in conflict with the conclusion that the present judgment should be affirmed, with costs.

VANN, J. (dissenting). When a sheriff is sued, as such, for an official act done in his own county, and damages are assessed against him for the conversion of a common kind of property, they should not be measured by the market price at a place 3,000 miles away, but by the market price in the locality where the act of conversion took place. That is the general rule, and there is

no occasion for an exception; for there was a home market, and the defendant was not a common carrier. A public officer, who makes a mistake in an effort to discharge an official duty and is required to pay damages in consequence, should not be compelled to visit foreign countries and import witnesses therefrom in order to keep the damages within reasonable limits. No authority requires us to sanction proof of the market price at a remote place on another continent, and it is against public policy to establish a rule that may call a sheriff far from the county, and even the state, where his official duties are to be performed. Evidence of the market price at no place outside of the state where the owner was deprived of his property should be allowed, and I regret that a rule is about to be laid down which will not only be inconvenient in practice, but will frequently lead to injustice. As the question is open in this state, why should we go abroad for a market price when we have one at home? If we can go to England, we can go to Russia, China, or Australia, and to points where local conditions may temporarily raise the price, and where tariff regulations may hamper investigation and complicate the question. In laying down a rule to govern our own citizens, the market price established by themselves should be sufficient to measure the value of property converted in this state. I apprehend that no other rule will be welcome to them, or regarded by them as just or right. Simple rules are the best, and no exception should be made except to prevent injustice.

Even where the property is on the way to a better market, if the act is neither vindictive nor a violation of contract, future profits, although reasonably certain, should not be awarded, when the owner could purchase similar property at the place of conversion, and thus save prospective profits for himself, and the defendant from serious loss. Under such circumstances the home market price and interest is enough, without profits, cases against common carriers excepted, because the law is loath to allow them any excuse for nondelivery. American horses, raised, purchased, and converted in America, should be valued according to the American markets, rather than the English, even if they are on their way to England when converted.

CULLEN, C. J., and GRAY, HAIGHT, WERNER, and HISCOCK, JJ., concur with WILLARD BARTLETT, J. VANN, J., reads dissenting opinion.

Judgment affirmed.

"No doubt the true general rule of damages, in trover, is the value of the goods at the time of conversion, with interest." SHAW, C. J., in Fowler v. Gilman, 13 Met. 267.

Where defendant innocently converted coal by taking it from plaintiff's land, the plaintiff recovered as damages the value of the coal at the mouth of the shaft, less the cost of conveying it from the place where it was dug to the mouth of the shaft. McLean Co. Coal Co. v. Long, 81 Ill. 359.

In Learock v. Paxson, 208 Pa. 602, in a case of the wrongful conversion of fluctuating stock, the defendant was held liable to account to the plaintiff for the value of the stock at the highest rate which it had at any time attained since the conversion. In Connecticut, however, it was held, in Ling v. Malcom, 77 Conn. 517, that the plaintiff should "so act as to make his damages as small as he reasonably could." The question is at what price could he have re-purchased the stock after notice of the unlawful conversion and sale.

Where plaintiff owned an ice cream and candy store, and defendant got a receiver appointed illegally, the plaintiff's damages included the value of the store at the time the receiver was appointed and the actual loss sustained by plaintiff in the suspension of her business. Haverley v. Elliott, 57 N. W. Rep. 1010.

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4. *Replevin.*

WILEY *v.* McGRATH.

Pennsylvania, 1900. 194 Pa. 498.

DEAN, J. Joseph Wiley, the husband of plaintiff, kept a livery stable on Sydenham street, in Philadelphia. On the 27th of July, 1894, by regular bill of sale, he transferred to his wife, Elizabeth Wiley, four horses, some harness, two carriages, and one coupe, kept at the stable. While the consideration expressed is "one dollar and other good consideration," it is not disputed that she paid a full price for the articles. The wife took possession of the property, and undertook to carry on the stable. She gave notice generally of her purchase, and within a few days, having occasion to call upon Frank McGrath, who conducted a stable on Seventeenth street, she exhibited to him the bill of sale, and also showed it to young Frank C. McGrath, this defendant, who is a cousin of Frank McGrath, and assisted in the stable work. Her husband, it appeared, went to Ireland immediately after the sale, from whence he did not return until about the 1st of December following. On the night of December 7th two of

the horses, some harness, and a coach, all of which were embraced in the bill of sale, were taken from the wife's stable by the husband and sold to defendant. When she made search for her property, she called at the McGrath stable, but both McGraths feigned ignorance, and promised their aid in searching for the property. Five days later she discovered it in the McGrath stable. It had been purchased ostensibly by defendant from the husband, by regular bill of sale. Plaintiff at once replevied it. Defendant gave to the sheriff a claim-property bond, and retained possession. In the issue made up, he pleaded non cepit, and on this plea the case went to trial. The learned trial judge ruled that the plea admitted property in plaintiff, and rejected evidence tending to show a purchase of the property by McGrath from the husband. He also submitted the evidence to the jury, to find whether there had been such flagrant wrong and deception on part of defendant as to warrant punitive damages. The jury found for plaintiff $1,000 damages, and we have this appeal by defendant, who asigns nine errors. The first two allege that the court erred in not instructing the jury that the measure of damages was the actual value of the property at the time the writ was issued. While appellant concedes that punitive damages may be allowed in replevin, yet it is urged that it must be a rare case of misconduct where the jury will be allowed to exceed in their verdict the value of the property. That punitive damages in replevin may be allowed in all cases where there have been peculiar circumstancs of outrage, oppression, and wrong in the taking or detention was settled by this court in McDonald v. Scaife, 11 Pa. St. 381. The case was ably tried by Judge Lowrie in common pleas, and on appeal to this court was fully argued by able counsel on both sides; nearly all the authorities bearing on the question being cited. This court (Rogers, J., rendering the opinion), after a full review of the authorities and discussion of the subject, at the close of the opinion announces this conclusion: "On a review of the authorities, we have come to the conclusion that it is settled, on reason and authority, that although the ordinary rule is to give damages for the value of the goods taken, with interest, yet the jury may, under peculiar circumstances, go beyond it, by giving exemplary damages, as in case of an action of trespass." What were the circumstances here? This woman purchased this property from a thriftless husband, who immediately deserted her. She undertakes to earn

a living by conducting with it a stable for hire. Almost immediately she notifies defendant of her purchase, and exhibits to him the bill of sale. During some time she interchanges business in emergencies with him, for he also carries on a livery stable. He knew this property was absolutely hers. In a few months, unknown to the wife, the worthless husband returns, and in the nighttime secretly takes his wife's property from her stable and sells it to defendant, who conceals it. When the wife makes inquiry of him, he falsely alleges ignorance, and pretends to aid her in finding it. Then she discovers it in his possession and replevies it, and the cause is for trial. He admits, of record, the property is hers, and that he is wrongfully in possession, but seeks to retain it by beating the verdict down to the actual value at the issue of the writ, after he has had possession nearly four years; that is, after knowingly wronging her out of her property he wrongfully withholds it from her for years, and then seeks to turn the transaction into a forced sale of the property at its actual value when taken. Plaintiff's evidence tended to establish these facts, and the jury believed it. These are peculiar circumstances of wrong and oppression. They show collusion by defendant with a dishonest husband to deprive a wife of her property. Such circumstances are peculiar, because it must be a rare case, taking the worst view of human nature, that a man will be guilty of such conduct. We think the court, under the evidence and the law, committed no error in instructing the jury that, if they found the facts as plaintiff alleged, they might find punitive damages.

PABST BREWING CO. *v.* RAPID SAFETY FILTER CO.

New York, 1907. 107 N. Y. Supp. 163.

ERLANGER, J. This action was brought about May 20, 1904, to recover the possession of an automobile delivery wagon, or for the sum of $1,000 in case possession thereof could not be given to the plaintiff, and for the sum of $1,000 damages; the plaintiff alleging that the defendant the Rapid Safety Filter Company wrongfully gave possession of the said automobile to its codefendant, the Mobile Storage & Repair Company, for the purpose of being repaired. Plaintiff also alleged that the wagon was of the value of $1,000, but by reason of the wrongful detention by

the defendant it depreciated in value to the extent of $1,000. The answer denied the material allegations of the complaint. After the commencement of the action plaintiff replevied the wagon, which remained in its possession down to the time of the trial. The case was tried on the 1st of April, 1907, and the jury found a verdict in favor of the defendant the Rapid Safety Filter Company, awarding to it possession of the chattel, and assessed its value at $1,000. The judgment entered adjudged that the said defendant recover from the plaintiff the possession of the chattel described in the complaint, and that in case possession of the said property is not delivered to the said defendant it recover from the plaintiff the sum of $1,000, the value of the said chattel as found by the jury. On the entry of the judgment plaintiff paid the costs and served upon the defendant the Rapid Safety Filter Company a notice to the effect:

"Please let me know where you desire this chattel delivered. In the event of your failure to advise us, * * * we will store the same at your expense and risk, and subject to your order."

No execution having been issued, plaintiff placed the wagon in a storage warehouse subject to the order of the said defendant, and, as it claims, delivered the storage receipt to defendant's attorney. The defendant refusing to give a certificate of the satisfaction of the judgment, a motion was made to compel its execution, in order that the judgment might be satisfied of record. In opposition to the motion the filter company contended that on May 7, 1907, it inspected the wagon and found that there were missing one lamp, one complete set of batteries, four battery trays, two lamp brackets, one gong, one brake shoe, one electric controller, one controller lever, one starting switch, and considerable portions of the wiring which were present when the machine was replevied, and that the paint and varnish were scratched, marred, and defaced, and the vehicle in other respects injured, so that its value was not greater than $100. The court below granted the motion, and from that order this appeal was taken.

Whatever conflict there may be in the affidavits concerning the alleged depreciation in value of the chattel in suit intermediate its replevin by the plaintiff and the trial, it is clear that the chattel was in the same condition at the time of its tender to the defendant the Rapid Safety Filter Company pursuant to the commands of the judgment as it was at the time of the trial. In

an action of replevin the verdict must fix the damages, if any, of the prevailing party, and, where it awards to the prevailing party a chattel which has been replevied and afterwards delivered by the sheriff to the unsuccessful party, the verdict must also (except in cases not material to this question) fix the value of the chattel at the time of the trial. Section 1726, Code Civ. Proc. The jury having fixed the value of the chattel at $1,000, it is conclusively presumed that such was its value at the time of the trial. Allen v. Fox, 51 N. Y. 562, at page 564. We are therefore concluded by the judgment as to the value of the chattel at that time.

Under the judgment the plaintiff had the alternative of either paying such value or surrendering the chattel. When the unsuccessful party in an action of replevin surrenders the chattel described in the judgment, he fully complies therewith. If there has been a depreciation in value while the chattel remained in the possession or under the control of the unsuccessful party, the prevailing party may recover damages for such injury or depreciation. Section 1722, Code Civ. Proc. If the property has depreciated "intermediate the wrongful taking and the trial, still the prevailing party is obliged to take it, if he can obtain it, and he is indemnified for the depreciation by the damages assessed to him." Allen v. Fox, 51 N. Y. 565. Damages for detention includes loss arising from depreciation in value during the period of its detention. Brewster v. Silliman, 38 N. Y. 423. Damages to the chattel while in the possession of the officer acting under the replevin writ must be recovered in the action of replevin, and no action can be brought therefor subsequently, as the matter has become res adjudicata. Ritchie v. Talcott, 10 Misc. Rep. 412-414.

The case of Kingsley v. Sauer, 17 Misc. Rep. 544, cited by the appellant does not apply. In that case plaintiff recovered judgment for 7 tons and 180 cubic feet of hay, and the defendant used a portion of the hay and simply tendered the balance which the plaintiff refused to accept. If this action had been brought for the recovery of two automobile wagons, and the defendant had tendered one only, that case would have been more in point. It is not claimed by the appellant in its opposing affidavits that at the time the action was brought and the chattel replevied it exceeded in value the sum of $1,000. The jury having found that the value of the chattel at the time of the trial was $1,000,

the verdict carries with it the finding that there was no depreciation in value intermediate the replevin of the chattel and the trial, and, the chattel being in the same condition at the time it was tendered to the prevailing party as at the time of trial, plaintiff complied with the directions of the judgment, and was entitled to the order which was made.

The order should be affirmed.

In an action of replevin, where defendant was innocent and not a willful trespasser, and by his act has added largely to the value of the chattel taken, the unintentional trespasser is protected and the right of the owner to recover is limited. The expense of converting the thing to its new form is deducted. Eaton v. Langley, 65 Ark. 448. See also Peters Box & Lumber Co. v. Lesh, 119 Ind. 98, in a case involving logs and lumber. See, also, Gregory v. Morris, 96 U. S. 619.

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5. *Nuisance.*

SCHLITZ BREWING CO. *v.* COMPTON.

Illinois, 1892. 142 Ill. 511.

Appeal from the Appellate Court for the Third District.

This is an action on the case, by the appellee against the appellant company. In the trial court, the verdict and judgment were in favor of the plaintiff, which judgment has been affirmed by the Appellate Court. The declaration consists of two counts. The first count alleges, that plaintiff was possessed of certain premises in Springfield, in which she and her family resided, and that the defendant to wit: on April 20, 1885, wrongfully erected a certain building near said premises in so careless, negligent and improper a manner, that, on said day and afterwards, "and before the commencement of this suit," large quantities of rain-water flowed upon, against and into said premises and the walls, roofs, ceilings, beams, papering, floors, stairs, doors, cellar, basement and other parts thereof, and weakened, injured and damaged the same, by reason whereof said messuage and premises became and are damp and less fit for habitation. The second count alleges that plaintiff was the possessor, occupier and owner of said messuage and premises, in which she and her family dwelt, and the defendant, to wit: on said day, caused quantities of water to run into, against and upon the same, and the walls,

roofs, floors, cellars, etc., thereof, and thereby greatly weakened, impaired, wetted and damaged the same, by reason whereof said premises became and were and are damp, incommodious and less fit for habitation. The plea was not guilty.

The proof tends to show, that plaintiff's building is a two-story brick building with a cellar underneath, the front room on the first floor being used as a butcher's shop and the rest of the building being used as a dwelling; that the building was erected several years before that of the defendant; that defendant's building is on the lot west of plaintiff's lot, and is about 60 feet long, having an office in front and a beer-bottling establishment in the rear, and has one roof which slants towards plaintiff's property; that there are three windows on the west side of plaintiff's house, besides the three cellar windows; that her wall is a little over two feet from the west line of her lot; that when it rains the water flows against her west wall and some of it into her windows and cellar from the roof of defendant's building; that the eave-trough is so far below the eave that the water runs over it into the windows, etc.

MR. JUSTICE MAGRUDER delivered the opinion of the court. Proof was introduced of damage done to plaintiff's property after the commencement of the suit by reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit."

The question presented is, whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of the suit.

The rule originally obtaining at common law was, that in personal actions damages could be recovered only up to the time of the commencement of the action. 3 Com. Dig. tit. Damages, D. The rule, subsequently prevailing in such actions, is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute

a new cause of action. Wood's Mayne on Das. § 103; Birchard v. Booth, 4 Wis. 67; Slater v. Rink, 18 Ill. 527; Fetter v. Beale, 1 Salk. 11; Howell v. Goodrich, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict (Com. Dig. 363, tit. Damages, D.); and the reason why, in such cases, all the damages may be recovered in a single action, is that the trespass is the cause of action, and the injury resulting is merely the measure of damages. 5 Am. & Eng. Enc. Law, p. 16, and cases cited in note 2. But in the case of nuisances or repeated trespasses, recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts. McConnel v. McKibbe, 29 Ill. 483, and 33 id. 175; The C., R. I. & P. R. R. Co. v. Moffitt, 75 id. 524; C., B. & Q. R. R. Co. v. Schaffer, 124 id. 112. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant, as the injurious consequences resulting from his act; and hence the cause of action does not arise until such consequences occur, nor can the damages be estimated beyond the date of bringing the first suit. 5 Am. & Eng. Enc. Law, p. 17, and cases in notes. It has been held, however, that, where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. Idem p. 20 and cases in note. But there is much confusion among the authorities, which attempt to distinguish between cases where successive actions lie, and those in which only one action may be maintained.

This confusion seems to arise from the different views entertained in regard to the circumstances, under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." 1 Sedgwick on Das. (8th ed.) sec. 94. Some cases hold it to be unreasonable to assume, that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrued up to the date of the bringing of the suit. Other cases take the ground, that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury past and prospective, if

such injury be proven with reasonable certainty to be permanent in its character. Id. § 94. We think upon the whole that the more correct view is presented in the former class of cases. 1 Sutherland on Das. 199-202; 3 id. 369-399; 1 Sedgwick on Das. (8th ed.) §§ 91-94; Uline v. N. Y. C. & H. R. R. Co., 101 N. Y. 98; Duryea v. Mayor, 26 Hun. 120; Blunt v. McCormick, 3 Denio, 283; Cooke v. England. 92 Amer. Dec. 630, notes; Reed v. State, 108 N. Y. 407; Hargreaves v. Kimberly, 26 W. Va. 787; Ottenot v. N. Y. L. & W. R'y Co., 119 N. Y. 603; Cobb v. Smith, 38 Wis. 21; Delaware & R. Canal Co. v. Wright, 21 N. J. L. 469; Wells v. Northampton Co., 151 Mass. 46; Barrick v. Schifferdecker, 123 N. Y. 52; Silsby Manuf'g Co. v. State, 104 N. Y. 562; Aldworth v. Lynn, 153 Mass. 53; Town of Troy v. Cheshire R. R. Co., 23 N. H. 83; Cooper v. Randall, 59 Ill. 317; C. & N. W. Ry. Co. v. Hoag, 90 Ill. 339. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful public structures, properly constructed and permanent in their character. In Uline v. N. Y. C. & H. R. R. R. Co., supra, a railroad company raised the grade of the street in front of plaintiff's lots, so as to pour the water therefrom down over the sidewalk into the basement of her houses, flooding the same with water and rendering them damp, unhealthy, etc., and injuring the rental value, etc.; in discussing the question of the damages, to which the plaintiff was entitled, the court say: "The question however still remains what damages? All her damages upon the assumption, that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? * * * There has never been in this State before this case the least doubt expressed in any judicial decision * * * that the plaintiff in such a case is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced.

In Duryea v. Mayor, supra, the action was brought to recover damages occasioned by the wrongful acts of one, who had discharged water and sewage upon the land of another; and it was held, that no recovery could be had for damages occasioned by

the discharge of the water and sewage upon the land after the commencement of the action.

In Blunt v. McCormick, supra, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term.

In Hargreaves v. Kimberly, supra, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage, which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues."

In Wells v. N. H. & N. Co., supra, where a railroad company maintained a culvert under its embankment, which injured land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses; reference was made to Uline v. Railroad Co., supra, and the following language was used by the Court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release, or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner."

In Aldworth v. Lynn, supra, where the action was for damages sustained by a landowner through the improper erection

and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the Supreme Court of Massachusetts say: "The plaintiff excepted to the ruling, that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. * * * That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner in such a case, who sues for damage to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case, we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way, as to prevent percolation, with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar, the defendant did not erect the house upon plaintiff's land, but upon his own land. It does not appear, that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages, arising from the negligent and improper construction of defendant's building, to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way, as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show, that the eave-trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said, that the eave-trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated re-

coveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in Aldworth v. Lynn, supra. There is a legal obligation to remove a nuisance; and "the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title, to result from the recovery of damages for prospective misconduct." 1 Suth. on Das. 199, and notes. * * *

We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action." 1 Sedgwick on Das. (8th ed.) § 93.

It follows from the foregoing observations, that it was error to allow the plaintiff to introduce proof of damage to her property caused by rain-storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given.

The judgment of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court.

Judgment reversed.

ACKERMAN *v.* TRUE.

New York, 1903. 175 N. Y. 353.

MARTIN, J. On March 15, 1898, the defendant conveyed to the plaintiff a plot of ground on the northeast corner of Riverside drive and Eighty-second street in the city of New York, which extends along the easterly side of Riverside drive about sixty feet and along the southerly side of Eighty-second street twelve feet. At the time of this conveyance the defendant also owned the property fronting on Riverside drive adjoining the lot conveyed to the plaintiff on the northerly side and extending to Eighty-third street. The plaintiff owned a lot adjoining that conveyed to her by the defendant on which there was a house in which she resided. Subsequent to the conveyance to the plaintiff the defendant constructed a row of houses on the plot owned by him northerly of the plaintiff's lot. The house which the defendant built upon the lot adjoining the plaintiff's was extended three feet and six inches beyond the easterly line of

the street, and had in addition what is known as a swell front or bay window also extending into Riverside drive. The plaintiff claims that so much of the house built by the defendant adjoining her property as extends beyond the line of Riverside drive and into that street is an unlawful invasion or trespass upon her rights, and is a public nuisance from which she has suffered special damages to a large amount by the diminution of the value of her property. This action was to compel the defendant to remove that portion of the building and to pay the plaintiff damages for the injury sustained by her by reason of such encroachment and invasion of her rights.

In the complaint, after describing the situation, it was alleged that the defendant had commenced and was erecting in Riverside drive, which was a public highway of the city of New York, and adjoining her property, a solid brick and stone wall, four stories in height, and extending into that street about four feet and about thirty-two feet in width; and that this unlawful structure injures her property, obstructs her view, interferes with her easements of light, air and access appurtenant thereto, and otherwise injures her property to the amount of ten thousand dollars. It is further alleged that the defendant's building is a violation of the provisions of the charter of the city of New York; that it constitutes a nuisance, and is an infringement upon and violation of the plaintiff's rights which will cause her irreparable damage unless the same is removed, for which she has no adequate remedy at law. In her demand for relief she asks for a decree adjudging the defendant's building to be an unlawful obstruction of the public highway and an unlawful interference with her easements of light, air and access; that the same be forthwith taken down and removed, and that the defendant be perpetually enjoined from reconstructing the same. An injunction pendente lite was also asked for and a judgment for ten thousand dollars damages was demanded. * * *

The defendant insists that inasmuch as the trial court found that the plaintiff has sustained no special damages by reason of the alleged encroachment, the complaint was properly dismissed upon the merits. The difficulty with this finding is that there was no evidence to sustain it, and as the affirmance by the Appellate Division was not unanimous, that question must be considered upon this appeal. The proof showed quite conclusively that the erection and maintenance of this encroachment upon the

street affected the value of the plaintiff's property, and that it was worth about fifteen thousand dollars less than it would be if the defendant's wall did not project into the street. The only theory upon which the court found, or which is insisted upon by the defendant as tending to show that the plaintiff sustained no damages, is the fact that her property is now worth more than it was before the wall was erected. It is not claimed that the extension of the wall into the street has improved the value of the plaintiff's property, but the claim is that inasmuch as she can now sell her property for an amount exceeding the price which she paid, she has suffered no damages. The logic of this contention is not apparent. If she made a fortunate purchase, or if it has become so by the improvement of that neighborhood, she is certainly entitled to the benefit of any advance in the value of the property so purchased. In ascertaining the damages she has sustained, the true rule is to prove the value of the property with the defendant's encroachment, and its value with that encroachment removed and the difference is the measure of her loss. That difference was proved to be fifteen thousand dollars. Under these circumstances, it is difficult, indeed quite impossible, to see how it can be properly said that the plaintiff has suffered no special damages. We are of the opinion that the trial court was not justified, upon the evidence in the record, in finding that the plaintiff has sustained no special damages by reason of the encroachment.

In the further consideration of this case it will be assumed that the plaintiff has established the fact that she has sustained special damages by reason of the defendant's encroachment upon the street amounting to about the sum of fifteen thousand dollars, and that these damages are peculiar to the plaintiff and in addition to those which were suffered by the general public. It is well established by the decisions of this court that interferences with public and common rights create a public nuisance, and when accompanied with special damage to the owner of lands give also a right of private action to such owner, and that a public nuisance as to the person who is specially injured thereby in the enjoyment or value of his lands becomes also a private nuisance. That this encroachment upon the street was a public nuisance and that as to the plaintiff it was a private nuisance, we have no doubt. In the language of Blackstone, a private nuisance is "anything done to the hurt and annoyance of the

lands, tenements or hereditaments of another," which embraces not a mere physical injury to the realty, but an injury to the owner or possessor as respects his dealing with, possessing or enjoying it, and that one erecting or maintaining such a nuisance is liable in an action at the suit of another who has sustained such special damages, and he may be restrained in equity from continuing the nuisance. (Adams v. Popham, 76 N. Y. 410; Francis v. Schoellkopf, 53 N. Y. 152; Kavanagh v. Barber, 131 N. Y. 211, 213; Wakeman v. Wilbur, 147 N. Y. 657, 663.) In the case last cited Judge O'BRIEN said: "The obstruction of the public highway is an act which in law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and to recover the special damages by him sustained" (citing People v. Kerr, 27 N. Y. 193; Davis v. Mayor, etc., of N. Y., 14 N. Y. 506; Adams v. Popham, 76 N. Y. 410; Chipman v. Palmer, 77 N. Y. 51), and he then adds: "The extent of the injury is not generally considered very important. It should be substantial, of course, and not merely nominal, and the fact that numerous other persons have been injured by the act is no ground for a denial of the relief."

Under the principle of these authorities it becomes obvious, we think, that the plaintiff was entitled to maintain this action not only for the purpose of abating the nuisance, but also to recover any damages she might have sustained by reason of the wrongful acts of the defendant in constructing and maintaining this encroachment upon the street. * * *

Judgment reversed.

PRITCHARD *v.* EDISON ELECTRIC ILLUMINATING CO.

New York, 1904. 179 N. Y. 364.

HAIGHT, J. This action was brought to recover the damages resulting from the maintenance of a nuisance by the defendant. The plaintiff's testator, on the 19th day of April, 1890, leased from the owners the property known as "Miller's Hotel," situated on West Twenty-Sixth street, New York, at Nos. 37, 39, and 41, for the period of five years, at an annual rental of $15,000, and at the end of that period he renewed the lease for another period of five years at a rental of $12,000 per year. In

1888 the defendant constructed and put in operation an electric lighting plant and power station situated upon the same street 41 feet west of the hotel. In the complaint it is alleged that the defendant had so constructed and conducted its property and operated its machinery as to discharge upon the premises of the plaintiff great quantities of soot, cinders, ashes, noisome gases, unpleasant odors, steam, and water condensing from steam, which pervaded the premises of the plaintiff, fouling and injuring the same and the furniture therein, and further made and produced loud, disagreeable, and incessant noises, and very great jar and vibration, which was transmitted through the premises of the plaintiff, to the injury of the same, causing a great nuisance, and disturbing the rest and quiet of its inmates, and preventing their sleep, and injuriously affecting their health and their quiet and peaceful enjoyment and use of their apartments, to the plaintiff's damages, etc. Two actions were brought by the plaintiff's testator covering different periods of time, which have been consolidated and tried together as one action, resulting in the verdict upon which the judgment appealed from was entered. * * *

The serious question in the case pertains to the rule of damages adopted by the trial court. The jury was charged that: "If the defendant's power station, as operated, was a nuisance, and lessened the profits of this hotel, the damages which the plaintiff may recover are to be limited to the actual loss of profits, such as you find from the evidence were caused to be lost through the defendant's acts in the use and operation of its power station." And again: "Generally, upon the question of the plaintiff's claim that profits were lost, you should first take the gross receipts of this hotel, year by year, as they appear to you from the evidence to have been, and deduct from them, year by year, the rent paid by Mr. Haynes and the running expenses. This would give the net profits of each year." And finally: "You are to notice that at some time after the establishment of the station the rent of the hotel was lessened, and so far Mr. Haynes had less expenses in the running of his hotel. To this extent, if his gross receipts fell off, there would still be no loss, unless the reduction of gross receipts was greater than the reduction of rents. The same considerations would apply to any reduction of the running expenses of the hotel after the year 1888, since your comparison of profits before and after the station was

established must be based upon the net profits in each year; that is, profits over and above the actual rent and running expenses year by year. You are to make this comparison, gentlemen, for the purpose of finding whether there was a loss during the period after the defendant's station was in operation. If there was a loss, you are then to consider how much of it was reasonably caused by the defendant's act in maintaining the power station. And the damages which you may award in this action would be the amount of loss which you find to have been caused by the nuisance from November 22d, 1892, to November 1st, 1898."

The plaintiff's evidence tended to show that the premises had been conducted for many years as a family hotel, and that but few rooms were reserved for transients; that in the renting of rooms or apartments the board or meals were included; and that the gross income from the rental of rooms by the year is shown by Exhibit 9, from which is appears that in 1883 the rents received amounted to $50,376.22. From this there was a gradual falling off each year, until 1886, when the amount received was but $40,963.56. From this there was a greater increase in rents, even after the establishment of the defendant's plant, until 1891, when the amount received was $46,307.75. During the next year there was a falling off of $6,000, and of the next year of $4,000, and of a gradual decline in the following years, until 1896, when the receipts had fallen to $32,754.49. In 1897 there was again substantial increase in the income. The plaintiff's expert witness Perry gave evidence tending to show there was a depreciation in the rental value of the premises from 1892 down to 1900 of about $2,000 per year. It appears that at the end of the first lease in 1895 the landlord, in settling with the plaintiff, his tenant, deducted $9,000 from the rent required by the lease; that in giving the new lease for another five years the rent was reduced $3,000 per year; and that upon the termination of that lease another reduction was given upon the rent accrued amounting to $10,250. The running expenses of the hotel either before or after defendant's plant became a nuisance we have not found in the appeal book, so that we have no basis from which we can ascertain the net profits for any year, or as to whether there was any loss of such profits in any year. * * *

We are thus brought to the consideration of the exceptions taken to the defendant's request to charge. There are two that

bear upon the subject of damages which require consideration. The first is: "The measure of damages applicable to a case of this kind is the actual diminution in rental value by reason of the defendant's acts." This request undoubtedly states the general rule, and the diminution in rental value is one of the items of damages applicable to this case. But the trouble with the request is that it is not the only item of damage applicable. As we have seen, the complaint alleges the fouling of the premises and the injuring of the furniture from the great quantities of soot, cinders, etc., escaping from the defendant's premises and pervading those of the plaintiff. During the trial there was some evidence given tending to show that the window curtains, windows, and furniture generally would become soiled, and new upholstering necessary much oftener than before the plant became a nuisance, and that the services of an extra man became necessary to do the cleaning, whose services cost from $20 to $25 a month. So that, while diminution in rental value becomes an item of damages which the jury might award, in this case there has been alleged, and evidence given tending to prove, other independent items of damages not covered by the diminution in the rental value of the premises. As to whether loss of profits in a business established upon the leasehold premises can be recoverable in any case, we are not called upon to consider, nor do we now determine the question, for the reason that it is not raised by any exception which we have power to review.

The other request to charge is that "loss of income from business is not provable as an element of damage." There may be a loss of income, and at the same time an equal lessening of the expenses of the business, so that the net profits would remain the same. This request, therefore, does not present the question as to whether the loss in net profits from a business is provable as an item of damages. In this case the rent of rooms or apartments in the hotel was a part of the business in which the plaintiff was engaged. We think that the evidence showing the depreciation in the rent of the rooms in the hotel from year to year was competent as bearing upon the question as to whether there was a diminution in the rental value of the whole premises, and that the request to charge under the circumstances was properly refused.

For the reasons stated, the judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, VANN, and WERNER, JJ., concur. MARTIN, J., absent.

Judgment affirmed.

An electric lighting company, though it has the power of eminent domain, cannot erect a nuisance which impairs the legitimate use of private property. If it does, exemplary damages can be recovered for a second offense. Ganstler v. Met. El. Co., 214 Pa. 628.

One may be compensated for destruction of ornamental trees, flowers and vines. Articles of luxury will be protected no less than articles of necessity. The law will protect a flower as well as an oak. The law will not compel a man to take money rather than the objects of beauty which he places around his dwelling to gratify his taste. Campbell v. Seaman, 63 N. Y. 568.

Where a nuisance obstructs a public highway and the same can be removed at a trifling cost such cost is the measure of damages. Mellick v. Penn. R. R. 208 Pa. 457.

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6. *Assault and Battery.*

FETTER *v.* BEAL.

King's Bench, 1698, 1701. 1 Ld. Raym. 339, 692.

Special action of trespass and battery for a battery committed by the defendant upon the plaintiff, and breaking his skull. The plaintiff declares of the battery, &c., and that he brought an action for it against the defendant, and recovered £11 and no more; and that after that recovery part of his skull by reason of the said battery came out of his head, *per quod*, &c. The defendant pleaded the said recovery in bar. Upon which the plaintiff demurred. And Shower for the plaintiff argued, that this action differed from the nature of the former, and therefore would well lie, notwithstanding the recovery in the other; because the recovery in the former action was only for the bruise and battery, but here there is a maihem by the loss of the skull. As if a man brings an action against another for taking and detaining of goods for two months, and afterwards he brings another action for taking and detaining for two years, the recovery in the former action is not pleadable in bar of the second. If death ensues upon the battery of a servant, this will take away the action *per quod servitium amisit*. And then if a consequence will take away an action, for the same reason it

will give an action. If a man brings an action for uncovering his house, by which his goods were spoiled, and afterwards by reason of the said uncovering new goods are spoiled, he shall have a new action *Quod Holt negavit.* And *per totam curiam,* the jury in the former action considered the nature of the wound, and gave damages for all the damages that it had done to the plaintiff; and therefore a recovery in the said action is good here. And it is the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for this loss of the skull also.

Judgment for the defendant, nisi, &c.

BEACH *v.* HANCOCK.

New Hampshire, 1853. 27 N. H. 223.

In this action of trespass for an assault, it appeared that while the plaintiff and defendant were engaged in a bitter controversy, the defendant went into his office, which was near at hand, and obtained a gun, which he pointed in a threatening manner at the plaintiff, who was three or four rods away. The defendant snapped the gun which was not loaded two or three times at the plaintiff, the latter not knowing that the gun was not loaded.

The court instructed the jury that the defendant had committed an assault, and that in assessing damages, it was their duty to consider the effect that trivial damages would have in encouraging a disregard of the laws and disturbances of the peace. The defendant excepted. The jury brought in a verdict for the plaintiff, and the defendant moved for a new trial.

By Court, GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant, to show that the ruling of the court was incorrect. Among them is the case of Regina v. Baker, 1 Carr & Kirw, 254. In that case the prisoner was indicted under the statute of 7 Wm. IV and 1 Vic. ch. 85, for attempting to discharge a loaded pistol. ROLFE, B., told the jury that they must consider whether the pistol was in such a state of loading that under ordinary circumstances it would have gone off, and that the statute under which the prisoner was indicted would then apply. He says, also: "If presenting a pistol at a person, and pulling the trigger of it, be an assault at all, certainly in the case where the pistol is loaded, it must be taken to be an

attempt to discharge the pistol with intent of doing some bodily injury."

From the manner in which this statement is made, the opinion of the court must be inferred to be, that presenting an unloaded pistol is an assault. There is nothing in the case favorable to the defendant. The statute referred to relates to loaded arms.

The case of Regina v. James, 1 Carr & Kirw 529, was an indictment for attempting to discharge a loaded rifle. It was shown that the priming was so damp that it would not go off. TINDAL, C. J., said: "I am of opinion that this was not a loaded arm within the statute of 1 Vic. ch. 85; and that the prisoner can neither be convicted of the felony nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged."

The reason why the prisoner could not be convicted of the assault is given in the case of Regina v. St. George, 9 C. & P. 483, where it was held that on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged, and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself.

In this case, PARKE, B., said: "If a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."

So if a person presents a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life if the pistol had gone off, *semble* that this is an assault, even though the pistol were in fact not loaded. Ibid.

In the case of Blake v. Barnard, 9 C. & P. 626, which was trespass for an assault and false imprisonment, the declaration alleged that the pistol was loaded with gunpowder, ball, and shot, and it was held that it was incumbent on the plaintiff to make that out. Lord Abinger then says, "If the pistol was not loaded, it would be no assault," and the prisoner would be entitled to an acquittal, which was undoubtedly correct under that declaration, for the variance. Regina v. Oxford, id. 525.

One of the most important objects to be obtained by the enactment of laws and institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security, society loses most of its value, peace,

and order; and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace, damages incommensurate with the injury sustained, would certainly lead the ill-disposed to consider an assault as a thing that might be committed with impunity. But at all events, it was proper for the jury to consider whether such a result would or would not be produced. Flanders v. Colby, 28 N. H. 34.

Judgment on the verdict.

HANNA *v.* SWEENEY.

Connecticut, 1906. 78 Conn. 492.

TORRANCE, C. J. In the trial court the evidence for the plaintiff tended to prove that the defendant committed upon him a violent, unprovoked, and malicious assault and battery, whereby the plaintiff was greatly injured in mind, body, and estate. Upon that evidence the plaintiff claimed to be entitled, if the jury found in his favor, not only to full compensation for all his actual injuries, but also to damages, in excess of such compensation, variously termed exemplary, punitive, or vindictive; and the court correctly charged the jury in accordance with the tenor of this claim. St. Peter's Church v. Beach, 26 Conn. 355; Burr v. Plymouth, 48 Conn. 460; Maisenbacker v. Society Concordia, 71 Conn. 369; Welch v. Durand, 36 Conn. 182.

The court, however, further charged the jury with reference to such damages that, if they found in favor of the plaintiff, they might, "in addition to actual or compensatory damages, award

punitive damages or 'smart money,' as it is sometimes called, proportionate to the degree of malice or wantonness evinced by the defendant." It is of this part of the charge that the defendant chiefly complains. He says that by it the amount of "exemplary" damages which the jury might award to the plaintiff was erroneously left entirely at large to the discretion of the jury, and we think he is right in this claim. At common law, in certain actions of tort, the jury were at liberty to award damages, "not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." Pratt, L. C. J., in Wilkes v. Wood, Lofft, 1, 18, 19; Huckle v. Money, 2 Wils. 205; Lake Shore Railway v. Prentice, 147 U. S. 101; Goddard v. Grand Trunk Railway, 57 Me. 202; Day v. Woodworth, 13 How. 363; Dalton v. Beers, 38 Conn. 529.

Moreover, at common law, the amount of punitive damages that might be awarded was left almost entirely to the discretion of the jury; for the courts generally refused to grant a new trial for excessive damages of this kind. In Huckle v. Money, supra, the actual damages appeared to be about £20 sterling, but the verdict was for £300; and the court, in refusing to grant a new trial, said: "It must be a glaring case, indeed, of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages." In Day v. Woodworth, 13 How. 363, 14 L. Ed. 181, in speaking of the discretion of the jury in such cases, Justice GRIER says: "This (i. e., the amount of 'smart money') has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend upon the particular circumstances of each case. It must be evident, also, that, as it depends upon the degree of malice, wantonness, or oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages assessed by way of example may thus indirectly compensate the plaintiff for money expended in counsel fees, but the amount of those fees cannot be taken as the measure of punishment or a necessary element in its infliction." That the amount of punitive damages, in cases where such damages may be awarded, is generally left to the discretion of the jury, see, also, Cyc. vol. 13, p. 119, and

cases there cited, and Hale on Damages, c. 7, par. 83, and Sedgwick's Elements of Damages, p. 85.

This power of a jury, at common law in certain actions of tort, to award damages beyond mere compensation, and practically of such an amount as they in their discretion may determine, has resulted in the doctrine of punitive damages, which has been called "a sort of hybrid between a display of righteous indignation and the imposition of a criminal fine." Haines v. Schultz, 50 N. J. Law, 481. This doctrine has been said to be exceptional, anomalous, logically wrong, and at variance with the general rule of compensation in civil cases; but, notwithstanding the objections urged against it, it prevails in many, if not in most, of the states. Sedgwick's Elements of Damages, pp. 86, 87. In this state the common-law doctrine of punitive damages, as above outlined, if it ever did prevail, prevails no longer. In certain actions of tort the jury here may award what are called punitive damages, because nominally not compensatory; but in fact and effect they are compensatory, and their amount cannot exceed the amount of the plaintiff's expenses of litigation in the suit, less his taxable costs. "Such expenses in excess of taxable costs * * * limit the amount of punitive damages which can be awarded." Maisenbacker v. Concordia Society, 71 Conn. 369, and cases there cited.

The court, it is true, told the jury that in estimating punitive damages they might consider counsel fees and other expenses of the plaintiff to which he had been put in attempting to get compensation; but, probably by an oversight, they were not told that the amount of the punitive damages which they might award was limited by the amount of those expenses less the taxable costs in the suit; and afterwards they were told in effect that the amount of punitive damages was a matter that rested in their discretion, dependent upon "the degree of malice or wantonness evinced by the defendant."

There is error, and a new trial is granted.

The other judges concurred.

In Lowe v. Ring, 123 Wis. 107, it was held that in actions for assault and battery, it is enough to justify exemplary damages that malice prompted the assault, though it existed only a moment before the blow was struck.

For damages for assault and immoral solicitations, see Bruske v. Neugent, 116 Wis. 488.

In an action for assault and battery, plaintiff can recover only such

damages as are the necessary and proximate result of the act complained of. There can be no recovery in such a case for the loss of an office of mate in the navy to which plaintiff was about to be appointed. Brown v. Cummings, 7 All. 507.

In assault and battery the jury can consider whether the assault was deliberate, or made in the sudden heat of passion. Badostain v. Graside, 115 Cal. 425.

In these cases the question of verbal provocation is important as bearing on mitigation of damages. Osler v. Walton, 67 N. J. L. 63.

In such an action plaintiff cannot recover for fright of his wife and subsequent loss of her services. Hutchinson v. Stern, 115 App. Div. N. Y. 731.

Wounded feelings of plaintiff, humiliation and disgrace can be considered by the jury where a shop-girl was accused of theft, led through a store and searched and $4.20 taken from her. Henderson v. Agon, 148 Mich. 253.

Damages (which need not necessarily be nominal damages only) may be awarded for an assault and battery which consisted of the defendant, a milkman, entering the sleeping room of the plaintiff and forcibly waking him, for the purpose of presenting a bill to him. Richmond v. Fisk, 160 Mass. 34.

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7. *Slander.*

LYNCH *v.* KNIGHT.

House of Lords, 1861. 9 H. L. Cas. 577.

Action by Knight and his wife to recover damages for slanderous words spoken of the wife, imputing immoral conduct on her part prior to marriage. The special damage alleged was loss of consortium by the wife by reason of the speaking of the words. The jury found a verdict for 150 l.

Lord WENSLEYDALE. Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested. For instance, where a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose service is a material damage which a jury has to estimate; when juries estimate that, they

usually cannot avoid considering the injured honor and wounded feelings of the parent.

The loss of such service of the wife, the husband, who alone has all the property of the married parties, may repair by hiring another servant; but the wife sustains only the loss of the comfort of her husband's society and affectionate attention, which the law cannot estimate or remedy. She does not lose her maintenance, which he is bound still to supply. * * *

FLANNIGAN *v.* STAUSS.

Wisconsin, 1907. 131 Wis. 94.

In an action for slander the respondent recovered a verdict for $500 against the appellant, and judgment was accordingly entered, from which this appeal is taken.

TIMLIN, J. The appellant assigns two errors for which he contends the judgment should be reversed. * * *

The second assignment of error is as follows: "The court erred in denying the defendant's motion for a new trial." The motion for a new trial specified six grounds, but the brief of appellant states that this assignment of error is based on the ground that the damages awarded by the jury are excessive, and this is the only ground argued in support of that assignment of error. It is conceded that the words charged, if used, were actionable per se. There is also some evidence tending to sustain a claim for punitory damages. It is contended, in support of the claim that the damages are excessive, that the evidence shows the respondent to be "a woman extremely common, if not coarse." This is based upon the language alleged to have been used by her toward the appellant. It is well for the human race that female chastity is not peculiar alone to the educated and refined, but was also characteristic of the "common and coarse" mothers of the stout barbarians who laid the foundation of our present system of education and refinement, and who largely by their possession and preservation of this virtue became the master spirits of the world. It is, to say the least, no indication of decadence when the body of our people represented by the jury vigorously resent false and unfounded imputations against female chastity.

It is next contended that the alleged slanderous words were spoken in quarrel, and this should have the effect of reducing the punitory damages. No doubt this is a proper consideration in mitigation of damages, but the questions presented to this court are quite different from the ordinary consideration of mitigating circumstances by a jury. It is said in Donovan v. C. & N. W. Ry. Co., 93 Wis. 373, that in an action for unliquidated damages arising from a tort the court is not at liberty to set aside a verdict on the ground that it is excessive unless the excess is such as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. Applying this test to the verdict in question, there is no ground of reversal.

The judgment of the circuit court is affirmed.

"We think the rule is well settled that it is competent to show the reputation previous to the utterance of the alleged slander, as bearing upon the question of damage." MOORE, J., in Georgia v. Bond, 114 Mich. 197.

The following were held to be proper instructions: "If you believe from the evidence that at the time of the publication, the plaintiff was a woman of disparaged reputation, then that must be taken into consideration, because a woman whose reputation for chastity and virtue is bad cannot suffer the same damage as a woman of good reputation." Fowler v. Fowler, 113 Mich. 576. See Kloths v. Hess, 126 Wis. 587.

In a case of slanderously imputing want of skill to a physician, social degradation and disgrace and loss of professional employment with its honors and rewards can and ought to be considered. Swift v. Dickerman, 31 Conn. 285.

For actions in slander see Pollard v. Lyon, 91 U. S. 225; Terwilliger v. Wands, 17 N. Y. 54. In case of slander, imputing larceny to the plaintiff, on an allegation in mitigation of damages, the defendant cannot show that in a single instance plaintiff behaved badly, but must confine himself to general reputation and character. Mahoney v. Belford, 132 Mass. 393.

Mental suffering is an element of general damages in an action of libel. Turner v. Hearst, 115 Cal. 394;—an action for libel in publishing that Lotta, the actress, had got an order of arrest against plaintiff, an attorney at law. Only actual damages proved can be recovered in Michigan. Andrews v. Booth, 148 Mich. 333.

8. *Libel.*

SICRA *v.* SMALL.

Maine, 1895. 87 Me. 493.

WHITEHOUSE, J. This was an action of libel for defamatory matter, published in a newspaper, representing that the plaintiff and Mrs. Blake had "eloped," and were living together in adultery.

At the trial, evidence was offered by the defendant, and admitted by the court, subject to the plaintiff's right of exception, that the plaintiff's "general character" was bad in the community in which he lived.

I. It was not questioned by the plaintiff that, in actions for libel or slander, the character of the plaintiff may be in issue upon the question of damages; but it is contended that the inquiry should be restricted to the plaintiff's general reputation in respect to that trait of character involved in the defamatory charge. * * *

In this class of cases, the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation, as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question; and, as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue. Stone v. Varney, 7 Metc. (Mass.) 86; Leonard v. Allen, 11 Cush. (Mass.) 241; Eastland v. Caldwell, 2 Bibb (Ky.) 21; Powers v. Cary, 64 Me. 9; Sutherland on Damages, 679.

In Stone v. Varney, supra, the libel imputed to the plaintiff "heartless cruelty toward his child," and it was held competent for the defendant to introduce evidence, in mitigation of damages, that "the general reputation of the plaintiff in the community, as a man of moral worth," was bad. After a careful examination of the authorities touching the question, the court say, in the opinion: "This review of the adjudicated cases, and particularly the decisions in this commonwealth and in the state of New York, seems necessarily to lead to the conclusion that evidence of general bad character is admissible in mitigation of damages. * * * It cannot be just that a man of infamous

character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result, unless character be a proper subject of evidence before a jury. Lord Ellenborough, in 1 Maule & S. 286, says: 'Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.' "

In Leonard v. Allen, supra, the plaintiff was charged with maliciously burning a schoolhouse, and it was held that, in the introduction of evidence to impeach the character of the plaintiff, in mitigation of damages, the inquiries should relate either to the general character of the plaintiff for integrity and moral worth, or to his reputation in regard to conduct similar in character to the offense with which the defendant had charged him.

In the recent case of Clark v. Brown, 116 Mass. 505, the plaintiff was charged with larceny. The trial court admitted evidence that the plaintiff's reputation for honesty and integrity was bad, and excluded evidence that his reputation in respect to thieving was bad. But the full court held the exclusion of the latter evidence to be error, and reaffirmed the rule, laid down in Stone v. Varney and Leonard v. Allen, supra, that it was competent for the defendant to prove, in mitigation of damages, that the plaintiff's general reputation was bad, and that it was also bad in respect to the charges involved in the alleged slander.

In Lamos v. Snell, 6. N. H. 413, the defendant's right to inquire into the plaintiff's "general character as a virtuous and honest man, or otherwise," was brought directly in question; and it was determined that the defendant was "not confined to evidence of character founded upon matters of the same nature as that specified in the charge, but may give in evidence the general bad character of the plaintiff * * * in mitigation of damages, and for this inquiry the plaintiff must stand prepared."

In Eastland v. Caldwell, supra, the court say, in the opinion: "In the estimation of damages the jury must take into consideration the general character of the plaintiff. * * * In this case, the defendant's counsel was permitted by the court to inquire into the plaintiff's general character in relation to the facts in issue; but we are of opinion he ought to have been permitted to inquire into his general moral character, without relation to any particular species of immorality; for a man who is habitually addicted to every vice, except the one with which he

is charged, is not entitled to as heavy damages as one possessing a fair moral character. The jury, who possess a large and almost unbounded discretion upon subjects of this kind, could have but very inadequate data for the quantum of damages if they are permitted only to know the plaintiff's general character in relation to the facts put in issue."

With respect to the form of inquiry, it is said to be an inflexible rule of law that the only admissible evidence of a man's character, or actual nature and disposition, is his general reputation in the community where he resides. Chamb. Best, Ev. 256, note. It would seem, therefore, that, in order to avoid eliciting an expression of the witness' opinion respecting the plaintiff's character, the appropriate form of interrogatory would be an inquiry calling directly for his knowledge of the plaintiff's reputation in the community, either as a man of moral worth, without restriction, or in the particular relation covered by the libel or slander.

II. But the plaintiff also has exceptions to the following instruction in the charge of the presiding justice: "I am requested by the counsel for the defendant to instruct you that, if the plaintiff's conduct was such as to excite the defendant's suspicions, it should be considered in mitigation of damages, the plaintiff alleging that he had never been suspected of the crime alleged. I give you that instruction." * * *

The obvious objection to it is that the damages in an action of slander are to be "measured by the injury caused by the words spoken, and not by the moral culpability of the speaker." We have seen that the defendant is permitted to prove that the plaintiff's general reputation is bad, because this evidence has a legitimate tendency to show that the injury is small; but the evidence of general report that the plaintiff is guilty of the imputed offense is inadmissible for the purpose of reducing damages. Powers v. Cary, supra; Mapes v. Weeks, 4 Wend. (N. Y.) 659; Stone v. Varney, supra. A fortiori, evidence of the defendant's suspicions, however excited, cannot be received for such a purpose. Watson v. Moore, supra.

This instruction to the jury must therefore be held erroneous; and for this reason the entry must be, exceptions sustained.

HASKELL, J. concurred in the result.

SMITH *v.* MATHEWS.

New York, 1897. 152 N. Y. 152.

BARTLETT, J. This is an action to recover damages for an alleged libelous publication in two newspapers of the defendants, and a jury rendered a verdict in favor of the plaintiff for $4,000. The general term of the late superior court of Buffalo reversed the judgment entered upon the verdict, and ordered a new trial. A single question is presented on this appeal. The learned trial judge, after a very full and fair charge to the jury, was requested by counsel for defendants to charge "that, unless defendants were moved by actual malice, the jury should not award the plaintiff damages by way of punishment." The court replied: "Yes, I charge you they must be moved by actual malice; but you may find actual malice if you find they failed to make an investigation as to the truthfulness of the charge." To this charge the defendants excepted. Taken as abstract propositions, both the request of defendants' counsel and the response of the court involved legal error. If by "actual malice" the defendants' counsel referred to actual spite or wicked intention on the part of defendants, then his legal proposition is unsound, as damages, by way of punishment, are not limited to actual malice as thus defined. If the trial judge meant to state to the jury that a failure on the part of the defendants to investigate the truthfulness of the charge before publication entitled them to find "actual malice" in the sense that it showed the defendants were moved by spite and wicked intention against the plaintiff, it is clearly erroneous as a legal proposition. The reversal of the general term rests upon this alleged error in the charge, for the reason that prejudice may have resulted to the defendants therefrom, as the jury might have based their verdict upon actual, as distinguished from implied, malice, or malice in law. It is necessary, in order to properly decide the question thus presented, to examine the entire charge to the jury in the light of the facts and the proceedings at the trial. The defendants published the alleged libel in two newspapers owned by them,—the Buffalo Morning Express, issued daily, and the Buffalo Illustrated Express, issued weekly. The plaintiff, at the time of the publication, was a young married woman, living with her husband and children in Toronto, province of Ontario, moving in high social circles, and possessed of a good reputation. On or about

June 14, 1890, the defendants published in their newspapers an article received by them through the United Press Association, charging that the plaintiff, the wife of a Toronto merchant, had eloped with one Rutherford, a young bachelor of 30; that the incident had created a great stir in Toronto, and her husband would investigate, etc. It was admitted by defendants at the trial that there was no elopement, and the plaintiff proved that she was escorted to New York by Rutherford at the suggestion and request of her husband, who met her at the Grand Central Station on their arrival in that city. For the purposes of this appeal, it can be taken as admitted that the article complained of was a gross libel, charging the plaintiff, a reputable married woman, with the gravest offense that can be committed by a wife and mother; that it was published in the two newspapers of defendants, both of which were circulated to some extent in the city of Toronto, which is distant 70 miles from Buffalo.

At the close of the main charge the defendants' counsel said: "I except to that portion of your honor's charge in which you instruct the jury that they may give damages by way of punishment, it being conceded that there was no actual malice either upon the part of the defendants or their agent. By the Court: You will not misunderstand the court upon that proposition. They have disclaimed any actual malice, and the court has told you that must be accepted by you as true; that they did not at the time actually intend to inflict injury; consequently from that statement you would not be justified in awarding damages by way of punishment. But if you find that they could have found out the truthfulness or untruthfulness of this charge that they made, and they failed to make any investigation, you would be able to find such action upon their part, or upon the part of their agent, was a wanton act of negligence from which the law would imply malice, and you would be authorized to award vindictive damages, if you so find." It was at this point, and after the court had again placed correctly before the jury the precise issue and the rule of damages, that the erroneous charge was made upon which the general term reversed, and to which we have adverted. We are unable to agree with the learned general term that it cannot be said with reasonable certainty that the defendants were not prejudiced by this lapse of the trial judge in telling them they could find actual malice if they found the defendants had failed to make an investigation

as to the truthfulness of the charge. The entire charge discloses repeated statements to the jury that there was no actual malice on the part of the defendants, and that, if they were to be held liable, it was by reason of implied malice for a reckless and negligent publication of the libel, and we are satisfied that the jury were not misled. This error of the trial judge was harmless under the well-established rule that it may often occur in a charge to the jury that particular words or expressions used, when taken by themselves, will be objectionable, or seem to be erroneous, but they should not be considered independently of the context. Chellis v. Chapman, 125 N. Y. 214; Sperry v. Miller, 16 N. Y. 407; Losee v. Buchanan, 51 N. Y. 492; Railroad Co. v. Babcock, 154 U. S. 201. This case was submitted to the jury in a manner most favorable to the defendants. It is undisputed upon the evidence that this publication was reckless and negligent; nevertheless the trial judge submitted that question to the jury, and told them they could award nominal, actual, or punitive damages. The learned counsel for the defendants insists that punitive damages are only recoverable in case of actual malice, when the wicked intent to injure exists. The rule is otherwise, and it has been repeatedly held in this state that a libel, recklessly or carelessly published, as well as one induced by personal ill will, will support an award of punitive damages. Warner v. Publishing Co., 132 N. Y. 181; Holmes v. Jones, 121 N. Y. 461, and cases cited; Id., 147 N. Y. 59.

The defendants have been cast in heavy judgment, and it may be that a smaller verdict would have answered the purposes of justice under the circumstances; but this publication was grossly negligent, and attacked, without the shadow of justification, the good name of an innocent wife and mother, charging her, in effect, with unfaithfulness to her marriage vows, and the abandonment of her children. All this came about, not because the defendants were impelled by a wicked intent to injure this plaintiff, but for the reason that, as one of them admitted upon the witness stand, it was not their custom, on receiving articles of news, to ascertain their truth or falsity before publication. The publishers who adopt this reckless rule in the conduct of their business must abide the consequences. The order appealed from should be reversed, and the judgment entered upon the verdict, and the order denying a new trial affirmed, with costs. All concur. Ordered accordingly.

TAYLOR *v.* HEARST.

California, 1897. 118 Cal. 366.

Action for libel. Judgment of $500 in favor of plaintiff, from which defendant appeals.

HENSHAW, J. This is a second appeal. The facts are substantially the same as those considered upon the first appeal. They will be found set forth at length in Taylor v. Hearst, 107 Cal. 262. It will be observed that the question of express malice, which may be evidenced either by a willful intent to injure, or by gross carelessness, was, under the facts and the law as laid down in the former opinion, entirely removed from the case. This was the view taken by the trial court, and the jury was so instructed. Plaintiff's recovery, therefore, was limited to compensatory damages. Certain questions asked of defendant's witnesses were ruled out under objections. These questions were addressed to the good faith of the publication, and to the negligence of the publisher. But good faith and reasonable care are pertinent inquiries where the question of punitive damages is involved, not where, the matter being libelous *per se*, and its publication admitted, the recovery is expressly limited to compensatory damages; for a plaintiff under such facts is entitled to compensatory damages, without regard to the good faith or caution which attended the publication. Wilson v. Fitch, 41 Cal. 363; Taylor v. Hearst, 107 Cal. 262; Turner v. Hearst, 115 Cal. 394; McAllister v. Detroit Free Press Co., 76 Mich. 338; Scripps v. Reilly, 38 Mich. 10; Warner v. Publishing Co., 132 N. Y. 185.

Instruction 3, given by the court, is as follows: "Good faith requires of a publisher that he exercise the care and vigilance of a prudent and conscientious man, wielding, as he does, the great power of the public press. There must be an absence, not only of improper motives, but of negligence, on the part of the defendant." This instruction would have had pertinency if addressed to a case in which punitive damages were claimed. Upon the facts of this case it had no bearing, for, as has been said, the court instructed the jury as matter of law that punitive damages could not be awarded. No injury, therefore, could have been worked appellant.

The award of $500 for compensatory damages cannot be regarded as excessive. Wilson v. Fitch, 41 Cal. 363; Gilman v. McClatchy, 111 Cal. 606. The judgment and order appealed from are affirmed. We concur: MCFARLAND, J.; TEMPLE, J.

BUTLER *v.* HOBOKEN PRINTING AND PUB. CO.

New Jersey, 1905. 73 N. J. L. 45.

REED, J. This is an action for damages for libel, defaming the plaintiff. The plaintiff was a professional rifle expert. Her professional name is Annie Oakley. As such she traveled with Buffalo Bill's show for a number of years. The Hoboken Observer, published by the defendant, published an article headed "Downfall of a Famous Woman Sharpshooter. Annie Oakley, a Victum of Drugs, Sent to Jail." It was asserted that Annie Oakley was a prisoner in the Harrison street police court; that she was arrested, charged with robbery; that she pleaded guilty, and was fined; that according to the police she was addicted to the use of drugs; that she was formerly with Buffalo Bill's show; that she was then destitute, and forced to accept shelter from an old colored man named Curtis; that a justice of the peace sent her to bridewell for 25 days. For the injury occasioned by this publication this action was brought, and a verdict of $3,000 recovered. This hearing is upon the return of a rule to show cause why this verdict should not be set aside and a new trial granted. It appears that the same item was sent out from Chicago, and was published in a number of newspapers throughout the country. The trial justice very properly charged that the defendant was liable for only that portion of the entire injury resulting from these publications as could be attributed particularly to the defendant. The trial justice also properly overruled testimony to show the particulars of actions brought against other newspapers for publishing a similar libel and the amount of damages received in some of those suits.

There is, however, another phase of the case which seems to call for more consideration. The declaration charged, as the result of the publications, that the defendant was greatly injured in health and obliged to go to great expense for procuring physicians and medicines. The trial justice charged that the defendant was responsible for so much of the injury to her health and resultant disability to follow her profession as was produced by this article. No exception was taken to this part of the charge, nor was the attention of the trial justice called to this language, nor, indeed, was any modification of this language suggested. The counsel for the defendant now insists that injury to health is not a legitimate element of damage in actions for

defamation of character. Even if this insistment is well grounded, as no exception was taken at the trial to the charge, the defendant is not *strictissimi juris* entitled to now raise that point. When an exception is taken to an instruction or to the admission of illegal evidence, the court, upon motion for a new trial, will not set aside the verdict if it appears that justice has been done. So, on the other hand, a verdict may be set aside when the rules of damages adopted are erroneous or testimony concerning them irrelevant, although no objection was made at the trial. Stewart's Digest, pp. 838, 839, §§ 10, 11, 40; Lippincott v. Souder, 8 N. J. Law, 161-165; Hatfield v. C. R. R., 33 N. J. Law, 251. The Hoboken Observer is a local newspaper circulating in the southern part of Hudson county. It is impossible to resist the conclusion that the element of ill health and its alleged consequences must have figured most influentially in inducing the jury to award $3,000 as damages. The injury caused by this publication to the private or professional reputation of the plaintiff, she following her profession in Europe as well as the United States, could hardly have been, under the circumstances, equivalent to $3,000. Indeed, in her testimony the money feature of special importance was her inability to shoot because of nervous prostration caused by this and other publications. By reason of this, she says, she was compelled to abandon an arrangement for the season of 1903 by which she was to receive $150 a week. So it would seem clear that this factor must have entered into the assessment of damages returned by the jury. If, therefore, it be true that injury to the health of a libeled person and the consequences flowing therefrom is not a legitimate ground for assessing damages, a new trial should be directed, although the error crept into the trial without objection.

The case upon the authority of which the defendant's insistment is grounded is Terwilliger v. Wands, 17 N. Y. 54. That was an action for slander charging the plaintiff with unchastity. The special damages proved were impaired health and mental trouble caused by the spoken words. The words spoken were not actionable in themselves, and so it required proof of some special damages to support the action. It was held that ill health, although actually produced by the slander was not, in a legal view, a natural or ordinary consequence of the slander. This case was decided in 1858. Two years later the English Court of

Exchequer, in Allsop v. Allsop, 5 Hurl. & N. 534, was called upon to deal with an action for slander, in which damages were claimed for sickness caused by a false charge of unchastity. Pollock, C. B., said: "There is no precedent for any such special damage as that laid in the declaration being made a ground of action, so as to render actionable what would otherwise not be so. * * * This particular damage depends upon the temperament of the party affected, and it may be laid down that illness, arising from the excitement which the slanderous language may produce, is not that sort of damage which forms a ground of action." In Lynch v. Knight, decided in the House of Lords in 1864, and reported in 9 House of Lords Cases, 593, and in 8 English Rul. Cases, 382, 388, Lord Brougham, in giving judgment, remarked: "I think Allsop v. Allsop was well decided, and that mere mental suffering or sickness supposed to be caused by the speaking of words not actionable in themselves, would not be special damages to support the action." Lord Wensleysdale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone; though, where a material damage occurs and is connected with it, it is impossible a jury in estimating it should altogether overlook the feelings of the party interested. For instance, when a daughter is seduced, however deeply the feelings of the parent may be affected by the wicked act of the seducer, the law gives no redress, unless the daughter is also a servant, the loss of whose services is a material damage, which a jury has to estimate. When juries estimate that, they usually cannot avoid considering the injured honor and the wounded feelings of the parent."

Each of the three cases mentioned was an action for slander, and the slander charged was for speaking words which were not actionable per se, and only became such if followed by special damage. The question in each case was in respect to the kind of special damage which would give rise to a cause of action. These cases seem to settle the rule that neither mental suffering nor physical sickness will alone do so in that class of actions. The present action belongs to a different class. The words for which damages are sought, not only charged the defendant with a crime and so were actionable per se, but they were printed and, as a libel, were similarly actionable. In this class of actions for defamation of character, upon proof of the publication, damages

are presumed to have accrued; therefore in such actions it is not necessary for the plaintiff in his declaration to plead special damages in order to support his action. If he desires to prove special damages he must plead them, it being the rule that no evidence shall be received of any loss or injury which the plaintiff sustains from the words used unless it be specially stated in the declaration and if named it must be proved as stated. 2 Saunders on Pleading & Evidence, marg. p. 927.

At this point arises the important question whether the range of what may be pleaded or proved as damages is wider in this class of actions than in those which depend entirely upon proof of special damages. Mr. Odgers, after stating the rule respecting special damages in the first class, if they have been properly pleaded proceeds to say that the law is not quite so strict in actions where the words are actionable per se; and that although when the words are not actionable per se, mental distress, illness, etc., do not constitute special damages, yet where the words are actionable per se the jury may take such matters into their consideration in according damages. Odgers on Libel & Slander. His authority for this statement is the remark of Lord Wensleysdale in Lynch v. Knight, supra, already quoted. Now it is to be observed that Lord Wensleysdale did not say that mental sufferings are to be regarded as a subject for special damages when the words are actionable per se. What he did say was that a jury, if permitted to return damages for a legal cause of action, would be influenced by the considerations mentioned. It is conceded, however, that while mental suffering will not support an action for words not actionable per se, nevertheless, damages for mental suffering may be assessed in actions for defamation actionable per se. In Massachusetts, such damages for mental distress are regarded as general, and are recoverable, without being specially pleaded. Chesley v. Thompson, 137 Mass. 136; Lombard v. Lennox, 155 Mass. 76. In New York such damages seem to be regarded as punitive and assessable only in cases where there is proof of actual malice. Brooks v. Harison, 91 N. Y. 83-92; Warner v. P. P. Co.. 132 N. Y. 181; Van Ingen v. Star Co., 1 App. Div. 429, affirmed 157 N. Y. 695.

The right of a libeled person to recover damages as a compensation for her feelings was recognized by our Court of Errors and Appeals in the case of Knowlden v. Guardian Printing Co., reported in 40 Vroom 670. Indeed, mental anguish, mortifica-

tion, and anger are the necessary results from defamation of character, and so may be said to be legally inferred from the fact of defamation. But, when physical injury is predicated of the defamatory words spoken, it cannot be said that it is either the necessary or natural consequence therefrom. In rare instances physical sickness may result from mental worry, but it is an exception to the rule. Even then, it is a step removed from the first result, and cannot be said to be the proximate consequence of the dafamatory words. The entire absence of any precedent, so far as I have examined the question, for the assessment of damages in this class of cases for physical ailment is a remarkable feature in the administration of the law, if such right to damages exists. There is an abundance of authority supporting the assessment of damages for mental anxiety, but none for damages for physical sickness. The same may be said of the other class of actions alluded to by Lord Wensleysdale, actions for seduction based upon the fiction of loss of services. By inveterate usage, the relations of master and servant having been established, the parent is to be permitted to recover for injured feelings. But it admittedly rests upon the ground of inveterate usage, and not upon any logical basis. Sedgwick on Damages, p 542.

In the present case the damages resulting from physical illness which the jury was permitted to consider did not stop with the mere compensation for such physical pain and expenses for medical treatment. The important loss resulting from her broken health was that she was compelled by reason of it to abandon her profession for a season at a loss of $150 a week. This alleged loss, it is perceived, did not result from failure to procure engagements by reason of loss of professional standing caused by the defendant's words. The loss of employment, therefore, was not the result of injured reputation, but of physical inability to shoot. This inability is traced back to mental worry, which resulted from knowledge by the plaintiff that she had been defamed. I am of the opinion that damages for loss of earnings so resulting, as well as for physical distress, are too remote. Nor can the amount of damages found be vindicated upon the ground that they might have been exemplary. The absence of actual malice was admitted by the plaintiff upon the trial, and the right to recover punitive damages was disclaimed.

The rule should be made absolute.

Punitive damages may be awarded for libel where defendant refuses to publish a retraction, but in fact republishes the libel. Crane v. Bennett, 177 N. Y. 106. But such damages cannot be awarded if the libel was published without malice. Gilman v. McClatchy, 111 Col. 606. But where defendant acted with reckless and careless indifference to the rights of the plaintiff, and took no pains to get a correct story and details, punitive damages were properly awarded. Russell v. Washington Post, 31 App. D. C. 277. See also Bee Pub. Co. v. World Pub. Co., 82 N. W. Rep. 28; Pellardis v. Journal Print Co., 99 Wis. 156; Bishop v. Journal Newspaper Co., 168 Mass. 327.

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9. *False Imprisonment.*

WEGNER *v.* RISCH.

Wisconsin, 1902. 114 Wis. 270.

This is an action for false imprisonment. The evidence tended to show that early of a Sunday morning, before 4 o'clock, the plaintiff was rambling about the neighborhood of the beat of the defendant, who was a policeman in the western part of Milwaukee, in a manner to excite attention and suspicion. Upon inquiry, she somewhat incoherently stated a desire to find a man from whom she wanted to get some money, and at last, under the guidance of the defendant, found the house, and entered into colloquy with the man on the subject of money. He told the policeman that she was crazy. The policeman left them in violent controversy. Shortly afterward his attention was called to her in another part of his beat by persons who had observed her wandering aimlessly about, and who suggested that she needed to be taken care of. The defendant talked with her again. She told him she lived on Jackson street, far on the other side of the city, but could not tell where on Jackson street. He urged her to go home, and then told her that if she would not go home he would have to send her to the station, to which she responded, "All right." He accordingly conducted her to the nearest patrol box, called a wagon, and turned her over to it with the explanation that she had been acting strangely, and he had arrested her for safe keeping. She was then taken to the station house, where she was not confined, but remained something like an hour, gave her residence, and was allowed to go home. According to the evidence of the defendant's witnesses, there was much to justify

the belief that the woman was demented and unfit to care for herself or be at large. The plaintiff's testimony gave a very different color to the whole transaction. The jury found a verdict for the plaintiff, and assessed her damages at six cents, which verdict her attorneys moved to set aside on the ground of inadequacy of damages. That motion being overruled, judgment was entered on the verdict, from which the plaintiff appeals.

DODGE, J. After careful examination of the record, we feel constrained to the conclusion that the trial court was guilty of no abuse of his discretion in refusing to set aside the verdict on the plaintiff's motion. Conceding, as perhaps the evidence establishes without controversy, that there was technically an unlawful arrest, in that the plaintiff was committing neither any crime nor a breach of the peace, yet the defendant's testimony that he arrested her because he believed her insane and in need of care for her own safety is of course sufficient to support such view of his conduct by the jury. In the absence of any violence and of any indignities other than the mere peaceful and orderly transportation of the defendant to a place of safety, when she was momentarily exposing herself to a far higher degree of notoriety and disgrace, although technically an unlawful deprivation of her liberty, we cannot say that the jury acted wholly outside of their proper province in finding only nominal damages. The rules of law which place that question more than all others in the hands of a jury are too trite to need more than suggested reference. Henderson v. McReynolds, 60 Hun, 579, and Bradlaugh v. Edwards, 11 C. B. (N. S.) 377, present extreme illustrations of cases in which courts have declined to set aside verdicts for nominal damages. In this case the spoken evidence was, of course, much supplemented to the jury and the trial court by the personal appearance both of the plaintiff and defendant; and that court having, in its discretion and with these advantages, approved the jury's action, we cannot, in the light of any information contained in the record, overrule his conclusion, whether as an original question we might or might not have reached the same conclusion.

Judgment affirmed.

CRAVEN *v.* BLOOMINGDALE.

New York, 1902. 171 N. Y. 439.

An action to recover damages for illegal arrest.

BARTLETT, J. We are of opinion that the learned trial judge failed to instruct the jury properly as to the law of punitive or vindicative damages. A brief statement of the facts is necessary in order to present the legal question involved. The defendant is the proprietor of a department store in the city of New York, under the firm name of Bloomingdale Bros. In the conduct of the business a large number of wagons owned by defendant are used in delivering goods purchased. The driver of the wagon involved in this action to recover damages for false imprisonment was employed under a written contract which authorized the defendant to charge him for, and deduct from his wages, any money, or the value of any merchandise, which might be lost, damaged, destroyed, or stolen after being placed in his charge. The driver also gave a bond, with surety, under this contract. The plaintiff purchased an article which, on delivery, proved unsatisfactory. It was returned, and another sent in exchange. Full payment had been made on the original purchase, and on the second article a small balance was due defendant. An error was made in defendant's store, by which the driver was required to collect the full price of the article, and not the balance actually due. The driver, on delivering the second article, insisted on full payment, or a return of the property. An altercation ensued between the plaintiff and the driver, and as the latter was denied full payment, or the return of the property, he sent out for a policeman; and the result was that plaintiff was arrested, taken to the police station, and, on a statement of the facts, at once discharged. The matter being brought to defendant's attention, he said he "was sorry that such a thing had happened," and asked what he could do. The plaintiff demanded the return of his money, and stated he desired to have no further business with the firm. This action was then commenced, and the jury rendered a verdict for $1,250. The appellate divison affirmed the judgment entered upon this verdict.

We have here presented the question as to the proper measure of damages in the case of a merchant whose servant, in the delivery of goods, causes the illegal arrest of a customer. The fact that the master was not present when the arrest was made does

not necessarily absolve him from liability. If, on the evidence, the jury could find that the master authorized the arrest, or subsequently ratified it, he must respond in damages. In the case before us it is not claimed the master directly authorized the arrest of the plaintiff, or ratified it when brought to his attention. It was, however, a question for the jury to determine, if the evidence warranted it, whether the manner in which the defendant conducted his business, through the intervention of the driver, constituted such a system as to render the act of the driver the act of the master.

After the trial judge had completed his main charge, he took up the plaintiff's requests, and said: "I do not think I made it very clear to the jury,—the distinction between compensatory and punitive damages. It is as follows: Damages in an action for false imprisonment, for humiliation, insult, and wounded sensibilities, are regarded in law as compensatory damages. If you find for the plaintiff, when you have reached some sum,—made up your mind; some sum that you think is reasonable and right in the way of compensatory damages,—then you have the power, if you think proper, to add to that some sum by way of punitive or vindicative damages. But your verdict will be an aggregate sum." At the close of the charge the defendant's counsel excepted to that portion of it in which the court said that it was within the province of the jury to give punitive or vindicative damages; also where the court said that the jury have the right to add a sum of punitive damages. The defendant's fifth request to charge reads, "That if the jury finds in favor of the plaintiff, they may not award punitive damages." The court refused to so charge, and an exception was taken.

The learned appellate division placed its affirmance of the judgment of the trial term upon the rule laid down in Lynch v. Railroad Co., 90 N. Y. 77, which was an action for false imprisonment, and quoted the language of the court in that case. * * * We are unable to see the similarity between these two cases. The gate keeper in the case cited rested under the duty to collect a ticket before a passenger was allowed to pass out. The passenger claimed that he had lost his ticket, and the gate keeper assumed it to be his duty to detain him and prosecute him under the circumstances. The case at bar presents a very different situation. The driver's remark, "I have got to have the stove or the money, because I am responsible for it," should be

considered by the jury in determining whether the driver acted for the defendant or himself. If the jury are to pass upon the question whether a system existed in defendant's business authorizing this arrest, they must also consider the circumstances under which the driver was employed. He was required to give security on entering his employment, and was personally liable to his employer for the goods intrusted to his care, or the money called for by his list. Undoubtedly, in the case supposed by the appellate division,—of an article taken from the wagon by a thief while passing along the street,—the driver, whether acting in his own behalf or that of his master, would be justified in pursuing the thief and causing his arrest. We are of the opinion that the jury retired without an accurate conception of the rule of damages in actions for false imprisonment. It is undoubtedly the rule that the master is liable in compensatory damages if his manner of conducting business justified the jury in believing that the servant was acting within the scope of his employment and discharging the ordinary duties imposed upon him.

The case at bar is clearly distinguishable from the recent case of Stevens v. O'Neill, 51 App. Div. 364, 64 N. Y. Supp. 663, affirmed in 169 N. Y. 375, 62 N. E. 424. In that case the plaintiff had been arrested in the store of the defendant under circumstances peculiarly distressing and humiliating. The above case, and other cases of like character, involving the conduct of retail stores, disclose a detective system which authorized officers and others in the employ of merchants to subject customers suspected of theft to personal search and other indignities. A system was thus established which made the acts of those effecting the arrest clearly those of the master. The case as bar is distinguishable from this line of authorities. In Voltz v. Blackmar, 64 N. Y. 440, Judge Andrews (page 444) uses this language: "In punitive actions, as they are sometimes termed, such as libel, assault and battery, and false imprisonment, the conduct and motive of the defendant is open to inquiry with a view to the assessment of damages; and if the defendant, in committing the wrong complained of, acted recklessly or willfully or maliciously, with a design to oppress or injure the plaintiff, the jury, in fixing the damages, may disregard the rule of compensation, and beyond that may, as a punishment to the defendant, and as a protection to society against the violation of personal rights and social order, award such additional damages as, in their discretion, they

may deem proper. The same rule has been held to apply in the case of willful injury to property, and in actions of tort founded upon negligence amounting to misconduct and recklessness. Tillotson v. Cheetham, 3 Johns, 56, King v. Root, 4 Wend, 113; Tifft v. Culver, 3 Hill, 180; Cook v. Ellis, 6 Hill, 466; Burr v. Burr, 7 Hill, 207; Taylor v. Church, 8 N. Y. 460; Hunt v. Bennett, 19 N. Y. 173; Millard v. Brown, 35 N. Y. 297." In Cleghorn v. Railroad Co., 56 N. Y. 44, the question involved was that of the negligence of an employe; and Church, C. J., said: "For the purposes of this case the following rule may be laid down as fairly deducible from the authorities, viz.: For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is also chargeable with gross misconduct. * * * Something more than ordinary negligence is requisite. It must be reckless and of a criminal nature, and clearly established."

In Railroad Co. v. Prentice, 147 U. S. 101, the law of punitive damages is exhaustively discussed.

It is to be observed that neither in Mott v. Ice Co., 73 N. Y. 547, nor in Lynch v. Railroad Co., 90 N. Y. 77, cited by the learned appellate division, was the law of punitive damages discussed, nor did the court below consider the question. In Mott v. Ice Co., supra, the question was whether the driver of defendant's ice wagon ran into plaintiff's carriage maliciously or intentionally, or whether the collision was due to negligent and reckless driving on the part of defendant's servant. Judge Allen, in writing for the court in this case, after alluding to the liability of the master for the acts of his servant within the scope of his employment, said: "But if the servant goes outside of his employment, and, without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible, so that the inquiry is whether the wrongful act is in the course of the employment, or outside of it, and to accomplish a purpose foreign to it. In the latter case the relation of master and servant does not exist so as to hold the master for the act. Croft v. Alison, 4 Barn. & Ald. 590; Wright v. Wilcox, 19 Wend. 343; Vanderbilt v. Turnpike

Co., 2 N. Y. 479; Mali v. Lord 39 N. Y. 381; Fraser v. Freeman, 43 N. Y. 566; Higgins v. Railroad Co., 46 N. Y. 23; Rounds v. Railroad Co., 64 N. Y. 129; Isaacs v. Railroad Co., 47 N. Y. 122." The learned judge, after discussing the evidence in detail, said: "The whole evidence of the witness only tended to show gross carelessness on the part of the driver of the ice cart, and that was the most, that the witness intended by the answer to either question. When the evidence is that the wrongful act was not within the general scope of the servant's employment, and so not within the express or implied authorization of the master, it is for the court to pass upon the competency of the evidence, and for the jury to give effect to it." It thus appears that this last case dealt only with the ordinary situation of the reckless driving of defendant's servant.

It is apparent that when the trial judge, in the case before us, having instructed the jury as to the law of compensatory damages, told them, in effect, that they had also the power, if they thought proper, to add to such sum as they fixed for compensation an amount for punitive or vindictive damages, the jury were furnished no rule under which these latter damages could be assessed. They were simply told that they had the power to award them. We do not wish to be understood as expressing any opinion as to the merits of this case, or as laying down a rule as to its particular facts that will embarrass the court below on a second trial. It will be for the jury to determine, upon the facts submitted for their consideration, whether the driver was acting within the general scope of his employment when he caused the arrest of the plaintiff, or was proceeding outside of that relation, and to accomplish a purpose foreign to it. If the jury find against the defendant, they will be at liberty to assess such reasonable compensatory damages as the plaintiff is entitled to by reason of the indignity of the arrest, and the humiliation incident thereto. Punitive or vindictive damages can be added to compensatory damages only when the case is brought within the rule so clearly laid down in the authorities we have discussed. This is a question for the jury to decide, if there is evidence for their consideration, under proper instructions by the trial judge.

The judgment of the appellate division should be reversed, and a new trial granted, with costs to abide the event.

PARKER, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, and VANN, JJ., concur. *Judgment reversed, etc.*

In an action for false imprisonment, the plaintiff may recover such damages as will reasonably compensate him for such injuries as he may have alleged and proved as a result therefrom, including damages for indignity, ridicule, and humiliation. McCaffrey v. Thomas, 4 Pennewill's Delaware Reports, 437. A railroad company is liable for punitive damages, when its train conductor unlawfully arrests and imprisons a person on the train, when such act is malicious, wanton, willful, or reckless. Davis v. Chesapeake & Ohio Ry. Co., 61., W. Va. 246. See also Linnex v. Banfield, 114 Mich. 98; and Bernheimer v. Becker, 102 Md. 250; and Cone v. C. R. of N. J., 62 N. J. L. 99.

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10. *Malicious Prosecution.*

SAMIELOFF *v.* N. Y. & Q. C. RY. CO.

New York, 1907. 107 N. Y. Supp. 774.

CLARKE, J. This is an action to recover damages for false arrest and malicious prosecution. The plaintiff testified that he was a passenger on a car of the defendant, and was making a trip to the cemetery to visit his wife's grave; that, as the car upon which he was riding approached the cemetery, he saw a disturbance or fight around a preceding car between the conductor and the motorman of that car and a number of passengers; that he took no part in the fracas, but protested to the motorman upon his car, and was told to "shut up," with an opprobious epithet, "or he would get his face punched in;" that on the way back to the terminus at the Thirty-Fourth Street ferry he again protested and received a similar reply; that he then told the motorman, "You so fresh to me, when the car stops in Thirty-Fourth street, near to the office to the ferry, then I be a witness. I go into the office, and I tell everything I saw what you do with these people;" that, when he got off the car at the ferry, he was arrested upon the complaint of the conductor of the car around which the fight had raged, whose head was cut and bleeding; that he was locked up overnight, held for the grand jury, was indicted, tried by a petit jury, and acquitted. The charge in that proceeding was that he had assaulted the conductor of the prior car with a stone. He produced no witnesses in regard to the occurrence at the cemetery. The conductor upon whose complaint the plaintiff was arrested is dead, but the company produced two employes and four apparently disinterested witnesses who were

passengers, the substance of whose testimony was that the plaintiff took part in the fight, threw a stone at the conductor, and was about to throw another when he was stopped by the conductor of his own car, and that he had a wrestle and struggle with that conductor and tore his coat. The jury found a verdict for the plaintiff, and assessed the damages at $2,000.

In charging the jury the learned court said:

"Because of what plaintiff's counsel urged on the question of exemplary or punitive damages, I charge you that unless the evidence satisfies you and persuades you, and not upon speculation or conjecture, that the defendant company had knowledge of any malicious act of the conductor, in the event that you should find that the conductor personally acted maliciously and with knowledge of the defendant company, even then there can be no recovery by way of exemplary damages or punitive damages against the defendant company, because of the individual malice of the conductor, even though you find that the act was within the conductor's duty. The law only charges and makes a master responsible for the individual malicious act of a servant when the master actually authorized it, had knowledge of it, or affirmatively ratified it. All of these elements must be proven to your satisfaction by evidence, and not by speculation or conjecture, namely, that the defendant company authorized the individual malicious act, that the defendant company had knowledge of it, and, having knowledge of a malicious act of the conductor, that it expressly ratified it."

Defendant excepted to the charge of the court, leaving to the jury all the question of exemplary damages. The respondent admits that the question of exemplary damages should not have been left to the jury. He says in his brief:

"This exception is without merit, because as matter of fact the court did not leave to the jury any question of exemplary damages. The court simply stated an abstract question of law favorable to the defendant, and a general exception to the charge is without purpose."

But from what the court said it is quite evident that plaintiff's counsel had very earnestly presented the question of exemplary damages and claimed to recover therefor in summing up the case to the jury; and it is quite evident from the exception and the court's reply to the exception that it was leaving to the jury the question of exemplary damages. There is no evidence

in the case, if the rules laid down by the trial court are correct, to sustain the finding of malice on the part of the company such as to charge them with exemplary damages.

In Craven v. Bloomingdale, 171 N. Y., 439, 64 N. E. 169, it was held that:

"A master cannot be held liable for punitive or vindictive damages by reason of wanton, oppressive, or malicious acts of the servant, unless there is proof to implicate him and make him *particeps criminis* of his servant's acts; and in an action brought against a master for an illegal arrest caused by his servant, it is reversible error for the trial court, after instructing the jury as to the law of compensatory damages, to instruct them that they had also the power, if they thought proper, to award punitive or vindictive damages, in addition to the amount fixed by them for compensatory damages, without further instructing them that such damages should not be awarded unless there was proof showing that the acts of the servant were wanton, oppressive, or malicious, and that the master was implicated with the servant therein, or had either expressly or impliedly authorized or ratified them."

The learned court correctly charged the law, but, as there was no evidence upon which the jury could have charged the alleged malicious acts of the servant upon the master, when the court's attention was called by the exception to the fact that he had left to the jury the question of exemplary damages, he should have instructed them that compensatory damages were all that they could find. The considerable space given in the charge to the discussion of this question which was not properly before the jury had a tendency to confuse the issue, and was harmful to the defendant.

The verdict is against the weight of the evidence, and therefore the judgment and order should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

11. *Fraud and Deceit.*

PEEK *v.* DERRY.

Supreme Court of Judicature, 1887. L. R. 37 Ch. Div. 541.

This is an action of deceit.

Plaintiff purchased 400 shares of stock in the Plymouth, Devenport & District Tramways Company for which he paid £4000. The action is brought for damages sustained by reason of reliance on untrue statements in the prospectus of the company made by the defendant to the effect that the company had an absolute right to use steam and other mechanical power which representation had induced the plaintiff to make the purchase.

COTTON, L. J. * * * The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of the defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4000. in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4000., and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the defendants was having the shares, instead of having in his pocket the £4000. The loss, therefore, must be the difference between his £4000. and the then value of the shares. Now it must not be taken that the value of the shares must be what they would have sold for in the market, because that might not show the real value at all. * * *

Sir JAMES HANNEN. I will add only a few words. * * * The question is, how much worse off is the plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4000. in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got. That must be ascertained by the light of the events which have happened down to the time of the inquiry—not what the shares might have been sold for, because he was not bound to sell them, and subsequent events may show that what the shares might have been sold for was not their true value, but a mistaken estimate of their value.

LOPES, L. J. The question in this case is what is the loss which the plaintiff has sustained by acting on the mere representation of the defendants, and what is the true measure of his damage? In my opinion, it is the difference between the £4000. he paid

and the real value of the shares after they were allotted. Any damage occurring after the discovery of the fraud, when the plaintiff might have rescinded the contract, and which would not be attributable to his acting on the misrepresentation, but to other causes, in my opinion would not be recoverable.

GUSTAFSON *v.* RUSTEMEYER.

Connecticut, 1898. 70 Conn. 125.

Action to recover damages for fraud in the exchange of real property. Judgment for plaintiff. Defendant appeals.

TORRANCE, J. The first question to be considered is whether the court erred in sustaining the demurrer to the counterclaim. The false representation therein set out and relied upon relates simply to the worth of the Julius street property over and above the incumbrances. It is a mere naked representation of the value of an equity of redemption, and nothing more. The general rule is that a mere naked assertion of the value without more, made between vendor and vendee during negotiations for a sale, though untrue, and known to be so by the one who makes it, and relied upon by the other, to his hurt, does not constitute an actionable deceit; and this for the reason that such an assertion, in most cases, is, and is understood to be, the statement of an opinion, and not of a fact, and the party to whom it is made has no right to rely upon it, and, if he does so, his loss, if any occurs, is held to be the result of his own folly. 1 Big. Fraud, p. 490; Parker v. Moulton, 114 Mass. 99; Morse v. Shaw, 124 Mass. 59; Homer v. Perkins, Id. 431; Ellis v. Andrews, 56 N. Y. 83; Chrysler v. Canaday, 90 N. Y. 272; Shanks v. Whitney, 66 Vt. 405. See, also, cases cited in note to Cottrill v. Krum, in 18 Am. St. Rep. 556 (s. c. 100 Mo. 397). There are, undoubtedly, exceptions to this general rule, arising out of the special circumstances under which the representation as to mere value is made,—as, for instance, where the one who makes the representation holds a position of trust or confidence towards the other, which gives the latter a right to rely on the representation, or where the seller has, or assumes to have, special knowledge of the value of the property, and the buyer has no knowledge thereof, and the latter, to the seller's knowledge, trusts entirely to the seller's representation. In such cases the seller may justly be held liable for his

false representations, because by them the buyer is fraudulently induced to forbear inquiry as to their truth. A mere false representation as to the value of real estate, knowingly made by the seller to the buyer, is not actionable, unless the buyer has been fraudulently induced to forbear inquiry as to its truth; and in that case the means by which he was thus induced to forbear inquiry must be specifically set forth in the pleading. "To such representations the maxim caveat emptor applies. The buyer is not excused from an examination unless he be fraudulently induced to forbear inquiries which he would otherwise have made. If fraud of this latter description is relied on as an additional ground of action, it must be specifically set forth in the declaration, and cannot be charged in general terms only." Parker v. Moulton, 114 Mass. 99, 100; Ellis v. Andrews, *supra;* Chrysler v. Canaday, *supra.* Upon the counterclaim, as it stands, the defendant's case falls within the general rule, and not within any of the recognized exceptions. If he desired to bring it within any of these exceptions, he should have alleged the specific facts which would bring it within one of them; but this he did not do, and for this reason the demurrer was properly sustained.

In his brief the defendant claims, in substance, that the general principles here applied to the statement of facts in the counterclaim, if applied to the facts found, show that the plaintiffs have no cause of action. He says, "Misrepresentations of the dimensions of the farm in question by the defendant to the plaintiff, even though intentional, cannot lay a foundation for an action, upon the facts found by the court." If the defendant were at liberty to make this claim here, it might be shown in reply that the facts set up in the counterclaim, and the facts found, differ very materially, and that this difference may be just the difference between a false representation that is actionable and one that is not; but the defendant, under the statute, (Gen. St. § 1135), is not at liberty to make this claim here, because he did not make any claim of this kind in the court below, nor has he made it in his assignments of error. Under the circumstances of this case, we decline to consider this claim.

The defendant claims that the court excluded the evidence of the value of the Julius street property as compared with the value of the farm, and that it erred in so doing. Although there is some doubt as to whether the court did absolutely and finally rule this evidence out, we will consider the case as if it had so

ruled. The defendant claimed that the measure of damages was the difference between the value of the farm and the value of the property given in exchange for it, while the plaintiffs claimed that it was the difference between the value of the property which the defendant owned and conveyed and its value if it had been as represented. From the record, it is clear that this evidence was offered solely as bearing upon the question of damages, and on the assumption that the rule as to the measure of damages was as claimed by the defendant. In his brief the defendant now claims that the evidence was admissible for another purpose, namely, as "tending to show the improbability of his having made the representations complained of." The evidence was undoubtedly admissible for this purpose, and for other purposes, as, for instance, as evidence—but not conclusive—to show, from the price paid, the value of the farm conveyed to the plaintiffs. Big. Frauds, pp. 627, 628; 3 Suth. Dam. p. 592. But the trouble with this claim is that it was not made in the court below, and cannot be considered now. The question, then, whether the court erred in excluding this evidence, depends on the further question, what is the proper measure of damages in cases of this kind? A vendee, induced to purchase land by false and fraudulent representations, may, acting seasonably, rescind the contract, and, after giving or offering to give back what he received, may recover back the consideration, or he may retain the land, and recover damages for the deceit in a proper action. Ives v. Carter, 24 Conn. 392; Krumm v. Beach, 96 N. Y. 398; Vail v. Reynolds, 118 N. Y. 297; Pryor v. Foster, 130 N. Y. 171. The present case is one where the plaintiffs have elected to keep the land, and seek to recover for the deceit in an action of tort; and the question is, what is the measure of damages in this action? Upon this question the decisions of the courts of last resort are not in harmony. In one class of cases the measure of damages is held to be the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be, while in the other class of cases it is held to be the difference between the real value of the property retained by the plaintiff, as it was at the time of the purchase, and the value of that which he gave for it. In the former class of cases the plaintiff is allowed the benefit of his bargain; in the latter, he is not. Morse v. Hutchins, 102 Mass. 439, is an example of the first class of cases, while Smith v. Bolles,

132 U. S. 125, is an example of the other class. In Morse v. Hutchins the court say: "It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be. * * * This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the plaintiff * * * only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer, and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract." In Smith v. Bolles, on the other hand, it was said: "The measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations. * * * The defendant was liable to respond in such damages as naturally and proximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out, and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation." Both of these cases relate to sales of personal property, but no distinction is made, in the application of these rules, between sales of personal and sales of real property. Big. Frauds, p. 627; Sedg. Dam. (2d Ed.) p. 559; 3 Suth. Dam. § 1171. And no good reason has yet been given why there should be any such distinction. Both courts, in the cases above mentioned, recognize the existence of the general rule that the defendant is only liable for such damages as are the natural and proxi-

mate result of his fraud, but they differ in applying it. In Morse v. Hutchins the loss of the benefits of his bargain is regarded as one of the elements of plaintiff's damages, resulting naturally and proximately from the fraud, while in Smith v. Bolles such loss is not so regarded. The general rule in regard to the measure of damages in actions of deception has been stated, and we think correctly, as follows: "The defendant is liable, not for everything that follows upon his fraud, but for what may be presumed to have been within his contemplation at the time, as a man of average intelligence." Big. Frauds, p. 625. Applying the general rule as thus stated to a case like the present, we think the loss of the benefits of the bargain is one of the elements of damages which the defendant must be held to have contemplated as the natural and proximate result of his conduct, and for which he is therefore answerable. In Big. Frauds, p. 627, the rule is stated as follows: "It is now well settled that, in actions for deceit or breach of warranty in sales of personalty or realty, the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be," citing numerous cases. This is the rule, also, as stated, and favored in 3 Suth. Dam. pp. 589, 592. It is the rule adopted and followed in numerous cases relating to the sale of personal property, and it is the rule adopted and followed in the following cases relating to the sale of real estate: Krumm v. Beach, *supra*; Vail v. Reynolds, *supra*, in New York; Drew v Beall, 62 Ill. 164, 168; Nysewander v. Lowman, 124 Ind. 584; Page v. Parker, 43 N. H. 363; Shanks v. Whitney, 66 Vt. 405; Williams v. McFadden, 23 Fla. 143. Moreover, it is the rule adopted and followed by this court in Murray v. Jennings, 42 Conn. 9. In that case it does not appear to have been much discussed, but its application was directly in question,—was, indeed, the only question in the case,—and it was specifically and deliberately adopted and followed. We see no good reason why it should not be considered as the settled rule in this state. The evidence of the value of the Julius street property, then, having been offered solely for the purpose of showing the amount of the plaintiff's damages, under the rule laid down in Smith v. Bolles, was inadmissible, and the court committed no error in excluding it for that purpose.

The court below did not err in admitting the evidence in question. * * *

In his last assignment of error, the defendant claims, in effect, that the court failed to adopt and apply any fixed rule as to the measure of damages, and did not assess them "in accordance with the rules of exact justice." The record shows that the parties upon the trial made specific, conflicting claims with respect to the rule of damages; and they were entitled to have the true rule applied, and to know which of the conflicting rules was applied by the court. It was the duty of the court to adopt and apply the rule which the plaintiffs contended for, and it was also its duty to make this known to the parties in some way. The record upon this point is not as clear as it should be. It says: "Adopting either rule, I find from the evidence as to the value of the several properties that the result would be approximately the same." The fact implied in this statement, that the court had heard and considered evidence as to the value of both properties, would seem to indicate the adoption of the rule which the defendant contended for, while there are other things elsewhere in the record which seem to indicate that the court adopted the other rule. The record does not show, either expressly or by clear implication, which of the conflicting rules the court adopted and applied. Perhaps the fair import of the record is that in the process of assessing the damages the court applied both rules, and, finding the results approximately the same, did not decide which of them was the true rule, and exclusively applicable. It was the duty of the court to decide this question, however, and to make its decision manifest in some way to the parties, and this was not done. We think the court erred in this but if, as is found, the application of either rule leads in this case to substantially the same result, it is difficult to see how the defendant has been harmed by the error, and for this reason we do not advise a new trial on account of it. There is no error. The other judges concurred, except HAMERSLEY, J., who dissented.

BROWN *v.* MORRILL.

New York, 1907. 55 Misc. 224.

PLATZEK, J. This is an appeal by the defendant from a judgment of the City Court in favor of plaintiff for $573.70. The

respondent's counsel in his points states: "The plaintiff's action is for deceit. He claims that he was induced by false representations to execute a lease to defendant's premises, to move in at a cost and expense and pay a month's rent," and specifying these items and the loss of the use and profits of his plant as his resulting damages. "The trial below was had on that issue and on that theory alone." The defendant interposed a general denial and asserted a counterclaim for past due rent. The appellant's theory is that the rights and obligations of the parties were measured and controlled by the written lease, and objected to the admission of testimony, and conducted the defense on the assumption that the lease entirely controlled and that evidence was admitted and given to vary and contradict the written instrument. The defendant's counsel is wrong in his view of the law, for the reason that the plaintiff is not suing for a breach of the covenant of the lease, but is seeking to recover damages for deceit in being fraudulently induced to sign the lease, relying upon the representations of the defendant. It is elemental that, in an action for deceit and false representations, the necessary allegations are: First. The fraudulent representation relied upon to sustain the cause of action. Second. The falsity of the representation. Third. The scienter. Fourth. The intent to deceive. Fifth. Proper damages. The only one of these elements found in the complaint is the representation; and that is not stated to be fraudulent, the alleged representation in this case being: "Mr. Lovejoy, the agent, showed me the electric service in the building, and said to me that all I needed is to go on and start to do work." "It was said, the electric service was right in the building, and I could have it if I want to." Lovejoy testified: "I told him that it was up to him to make arrangements to have his electricians come there. That was while I was in the building showing him the place." Plaintiff moved in and claims to have procured motor and wiring, but a tenant who had the basement refused to allow any connection to be made. It must always be remembered that no such condition or promise or suggestion is contained in the lease executed between the parties, which is in evidence and part of the record. It is nowhere alleged in the complaint that any representation was false and made with the intent to deceive, or that the defendant had knowledge of the falsity and induced the plaintiff to rely on the representation, knowing it to be false. In an action for deceit,

no recovery can be had on proof of the mere breach of a contract, unless all the necessary allegations to sustain a recovery for fraud and deceit are alleged, and then the breach of the contract may be averred by way of inducement only and not for any other purpose. Search will be made in vain in the complaint for any allegations and in the evidence in the case for any testimony to sustain an action for deceit and fraudulent representations relating to the lease in question. The plaintiff offered evidence of lost profits as an element of damages. Objection was made and overruled and duly excepted to. It was, in my judgment, reversible error to admit proof of lost profits in this case. The true rule of damages in this case is analogous to that of an evicted tenant, and is the difference between the value of the lease for the unexpired term and the stipulated rent, as well as the cost of moving into and out of the premises. An evicted tenant cannot recover prospective or lost profits. The measure of damages is, whether the action be on contract or in tort, the same, viz., the difference between the rent reserved and the value of the premises for the term, and the cost of moving in and out. Trull v. Granger, 8 N. Y. 115. This case was cited with approval in Eastman v. Mayor, 152 N. Y. 473. See also Oehlhof v. Solomon, 73 App. Div. 329, on rule as to damages generally, in actions for deceit and fraudulent representation. This judgment should be reversed. First. Because the allegations of the complaint are insufficient and do not set out a cause of action for deceit and fraudulent representations. Second. Because the evidence in the case is wholly insufficient to sustain a cause of action for deceit and false representations in the making of the said lease. Third. Because of error in admitting evidence, against objection, covering items for lost profits in the business of the plaintiff, amounting to $300. Fourth. Because the judge in his charge to the jury submitted to them as an element of damages: "That he also lost certain profits in his business, which he has detailed to you, amounting to about $300, which, added to the $315, makes $615, which is the amount he seeks to recover at your hands," to which the defendant's counsel duly excepted.

GILDERSLEEVE and SEABURY, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Where mining stock, represented as treasury stock, is sold under false representations, and is in reality private stock, the damages

resulting may be wholly speculative and recovery may be precluded. Findlater v. Dorland, 152 Mich. 301.

In an action of deceit for fraudulent sale of a gold mine, the question is what the plaintiff has lost by being deceived into the purchase. The reasonable market value, if the property had been as represented, affords no proper test of recovery. Sigafus v. Porter, 179 U. S. 116.

Plaintiff, in a legal sense, is not damaged by a false representation by which he is not influenced. Taylor v. Guest, 58 N. Y. 262.

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12. *Seduction.*

HEWITT *v.* PRIME.

New York, 1839. 21 Wend. 79.

This was an action on the case for the seduction of the seventeen-year-old daughter of the plaintiff, while she was, as yet, a member of her father's family. The girl testified on her chief examination that she had been induced by the defendant to swear the child upon some other person than himself, in consideration for his promising to marry her. Therefore she made oath before the justice that B. F., a fictitious person, was father of the child.

The plaintiff also brought forward the testimony of a practicing physician that the defendant had applied to the physician for drugs to secure an abortion, and upon one occasion, said that the female gotten with child was the plaintiff's daughter. The judge charged the jury that the daughter being a minor, a member of her father's family and under his control when seduced, no loss, expense, or damage, prior to the commencement of the action need be shown, it being sufficient to prove the seduction. The jury found for the plaintiff and the defendant demands a new trial.

By the Court, NELSON, CH. J. The witness, (the physician), I think, was not privileged. It is very doubtful whether the communication made to him by the defendant can be considered as consulting him professionally, within the meaning of the statute; and it is certain, that the information given was not essential to enable him to prescribe for the patient, if the daughter of the plaintiff should be considered a patient in respect to the transaction. 2 R. S. 406, § 73.

The judge ruled in the course of the trial that no actual loss of service, expense or damage, prior to the commencement of the

suit, need be shown; that the proof of the seduction was sufficient under the circumstances, pregnancy having ensued, and the daughter being a minor and a part of her father's family at the time. It is now fully settled both in England and here, Maunder v. Venn, 1 Mood. & Malk. 323, Peake's N. P. 55, 233, 2 Stark. Ev. 721, 9 Johns. R. 387, 2 Wendell, 459, 7 Carr. & Payne, 528, that acts of service by the daughter are not necessary; it is enough if the parent has a right to command them, to sustain the action. If it were otherwise, says Littledale, J., in Maunder v. Venn, no action could be maintained for this injury in the higher ranks of life, where no actual services by the daughter are usual. After this, I do not perceive how we can consistently maintain, that proof of actual loss of service is indispensable to uphold the action. If it may be sustained upon the mere right to claim them, or in the language of the cases, upon the supposed services, where none were ever rendered in fact, the ground of it, in the supposed case, precludes the possibility of any actual loss. Such is the spirit of the more recent cases, as will be seen by a reference to those above cited.

It was conceded by Hullock, sergeant, for the defendant in Revill v. Salterfit, 1 Holt, 450, that in most of these cases, the condition of service was regarded as a mere conveyance to the action. It was the form, he said, through which the injury was presented to the court; and having obtained its admission, upon legal principles, it brought along with it all the circumstances of the case.

The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the mere right to claim the services; they frequently admitted the most trifling and valueless acts as sufficient. In the case of Clark v. Fitch, 2 Wendell, 459, there was no proof of actual loss. And Martin v. Payne, 9 Johns. R. 387, was decided upon the ground that none were necessary. The only actual liability of the father that appeared in the former case, were for the expenses of the lying in, which have never been regarded as the foundation of the suit; they are received in evidence only by way of enhancing the damages. It is apparent from a perusal of the modern cases, and elementary writers in England, upon this subject, that the old idea of loss of menial services, which lay at the foundation of the action, has gradually given way to more enlightened and

refined views of the domestic relations: these are, that the services of the child are not alone regarded as of value to the parent. As one of the fruits of more cultivated times, the value of the society and attentions of a virtuous and innocent daughter, is properly appreciated; and the loss sustained by the parent from the corruption of her mind and the defilement of her person, by the guilty seducer, is considered ground for damages, consistent even with the first principles of the action. The loss of these qualities, even in regard to menial services, would necessarily greatly diminish their value.

The action then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggrevating the damages. It is not necessary that these should transpire before suit brought; if they are the natural consequences of the guilty act, they are but the incidents which attend, and give character to it.

Upon these views I concur with the learned judge who reviewed the case below, in denying a new trial.

New trial denied.

MATHIES *v.* MAZET.

Pennsylvania, 1894. 164 Pa. 580.

Action for seduction of plaintiff's wife. Judgment for plaintiff. Defendant appeals.

STERRETT, C. J. * * * Assuming the facts to be substantially as claimed by plaintiff, and as the jury must have found them, he was clearly entitled to recover damages, personal to himself, resulting from the acts complained of,—not merely a part, but the whole, of such resultant damages. Hence, it was strictly proper for the learned judge to call the jury's attention—as he did in that part of the charge complained of in the first specification—to the several ways in which the plaintiff could, and presumably did, suffer personal damages; and it thus became the duty of the jury to determine for themselves, from all the evidence, whether he did thus suffer from defendant's wrongful acts, and, if so, to what extent.

What was said in that part of the charge recited in the second specification was fully warranted by McAlmont v. McClelland,

14 Serg. & R. 361, wherein Mr. Justice DUNCAN said: "This inquiry into the condition of the defendant has constantly been made, and has always been applied to those cases where damages are designed, not only as a satisfaction for the injury, but as a terror to others, and as a proof of the detestation of juries. In cases of crim. con., actions for debauching a man's daughter, * * * actions for malicious prosecution, slander, and other actions of the same species, where the damages are not matters of calculation by dollars and cents, but where each must depend on its own particular circumstances of aggravation, and the condition in life of the parties, courts, unless the damages are outrageous, never set aside the verdict on account of the damages, but always take into view the situation of the parties as to property, and this they can only know from the evidence. * * * Damages are given by way of example. That which would be exemplary as to one would not make another feel,—would be no terror to him."

Properly construed, and as the jury doubtless understood the language employed, there is no error in that part of the charge quoted in the third specification. In saying to the jury: "You are to look at the wrong done to his social and family relations. You are to consider the dishonor brought upon his family," etc., —the learned judge referred solely to the personal sufferings and losses of the plaintiff, and not to the sufferings and losses of the family, as contradistinguished from those of the plaintiff himself. When dishonor was brought upon the family, he, of course, as its head, suffered thereby personally. When read in connection with the context and other parts of the charge, the meaning of the court cannot be mistaken.

The doctrine of punitive or exemplary damages, as applicable to such cases as this, is as old as the commonwealth itself, and it will be an evil day to the cause of justice and good morals if the principle upon which such damages have hitherto been sustained should be abandoned. On principle as well as authority, the learned judge was substantially correct in employing the language recited in the fourth specification. Cornelius v. Hambay, 150 Pa. St. 359. * * *

Judgment affirmed.

In an action for breach of promise of marriage, birth of an illegitimate child can be proved in aggravation of damages. Tubbs v. Van

Kleek, 12 Ill. 446. In such an action the wealth of defendant can be shown on the question of damages. Jacoby v. Stark, 205 Ill. 34.

In Grable v. Margrave, 4 Ill. 372, it was held that evidence of the pecuniary condition of the father was allowable on the question of damages.

It was held in Stewart v. Smith, 92 Wis. 76, that in an action for the seduction of plaintiff's daughter, evidence was admissible, in mitigation of damages, to show her want of chastity prior to the seduction; such evidence, including not only her general reputation, and specific acts of unchastity, but also impure conversation and improper familiarity with men.

Loss of services, loss of comfort and consolation, disgrace, and dishonor are elements of recovery in an action by a parent for the seduction of his daughter, and where intercourse is admitted, but seduction denied, plaintiff may show, in aggravation of damages, that the defendant after discovering that she was in the family way agreed to marry her. Milliken v. Long, 188 Pa. 411.

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13. *Criminal Conversation.*

ANGELL *v.* REYNOLDS.

Rhode Island, 1904. 26 R. I. 160.

TILLINGHAST, J. This is an action of trespass on the case for alienating the affection of the plaintiff's husband, whereby she alleges that she wholly lost his society, aid, and support. At the trial of the case in the common pleas division a verdict was rendered in favor of the plaintiff, and her damages were assessed at the sum of $1,500. The case is now before us on the defendant's petition for a new trial on the grounds that the verdict was against the evidence, and that certain rulings of the trial court were erroneous.

The rulings specially relied on by defendant's counsel as being erroneous, and the only ones which we feel called upon to consider, were those relating to certain testimony offered, and certain refusal of requests to charge, bearing upon the question of damages. The defendant offered to prove, in substance, that plaintiff's husband had been improperly familiar with other women than herself during the same period that she was charged with having maintained illicit relations with him, and hence that she was not responsible, in any event, for all the damages which the plaintiff had sustained in the premises. In other words, the

defendant's contention, in effect, was that the plaintiff's husband was a man of general bad character as a husband, and hence that the plaintiff could not look to her for all the damages which she had sustained thereby. However ungracious, or even odious, such a defense may seem to be from a purely moral standpoint, it is doubtless one which a defendant may interpose in a case of this sort. The question here is, how much has the plaintiff been damaged by the wrongful acts of the defendant in the premises, and not by the wrongful acts of others in the same direction? And if it should be made to appear that the husband's affection for his wife had, for any cause, commenced to wane before his intimacy with the defendant commenced, and that the defendant, taking advantage of that condition of things, secured for herself what there was left of his love for his wife, she can only be legally called upon to make the plaintiff whole for the share thereof which she thus took from her. Or, to state it differently, what was the loss which the plaintiff sustained by reason of the part which the defendant took in the premises? It is true, this may seem like an impossible question for a jury to answer, for how far the charms and blandishments of one woman, as compared with those of another or of others, may go in accomplishing the total destruction of a husband's affection for his wife, cannot be determined by any mathematical rules. But yet, like many other questions in practical life, it is capable of a reasonable solution. The law bearing upon the question under consideration doubtless is that "evidence in mitigation of damages will be received if it tends to show that the plaintiff has, in fact, suffered less injury than would otherwise be a probable inference from the acts proved." Sutherland on Damages (3d Ed.) § 745. Hence, in a case of this sort, it is proper to show unhappy relations between the plaintiff and her husband, or that she was wanting in affection for him (Hadley v. Heywood, 121 Mass. 236; Coleman v. White, 43 Ind. 429; Palmer v. Crook, 7 Gray, 418; Peek v. Traylor [Ky.] 34 S. W. 705; Rudd v. Rounds, 64 Vt. 432; Rose v. Mitchell, 21 R. I. 270), or that there had been improper familiarities between him and other women (Norton v. Warner, 9 Conn. 172; Waldron v. Waldron [C. C.] 45 Fed. 315). In Bailey v. Bailey, 94 Iowa, 598, which was an action by a wife against her father-in-law for alienating the affections of her husband, it was held to be reversible error to exclude evidence showing what the husband's state of mind towards his wife was,

and that other causes than the defendant's acts had to do with the alienation. In Churchill v. Lewis, 17 Abb. N. C. 226, it was held that the true relations between the plaintiff and her husband, and whether happy, or otherwise before the acquaintance with defendant; the state of his feeling and the extent of his affections toward his wife; and the effect produced upon the plaintiff by the existence of the relations between her husband and the defendant, as they appeared to her at the time—may be considered by the jury in estimating the damages. Prettyman v. Williamson, 1 Pennewill, 224; Schorn v. Berry, 63 Hun, 110; Browning v. Jones, 52 Ill. App. 597; 1 Greenl. Ev. (13th Ed.) § 102; Cool. Torts (2d Ed.) pp. 263, 264; Abbott's Trial Ev. 686; Ency. Ev. vol. 1, pp. 765, 766, and cases cited; 2 Hilliard on Torts, p. 509, § 21—are amongst the numerous authorities to the same general effect. But plaintiff's counsel contends that, even conceding that her husband had improper relations with other women than the defendant, yet, as the evidence shows that the plaintiff was not aware of that fact, and that, as he was affectionate towards her, and made a satisfactory husband, until the defendant interferred in the premises, it was not competent for the defendant to prove his secret vices, unless it could also be shown that they resulted to the injury of the plaintiff. We cannot agree with this contention. A wife is entitled to the full and undivided conjugal affection of her husband, and it is quite impossible that she should enjoy this right if he is improperly familiar with other women. There must necessarily be at least a weakening of the affections, or what is technically known as "the loss of consortium," in every such case—that is, a deprivation of the full society, affection, and assistance to which a wife is entitled; and hence, whether she has knowledge of the wrong or not, it cannot fail to result to her injury. The marital rights of a woman are unlawfully invaded whenever any one steps in between her and her husband, whether with or without her knowledge, and secures any part of the society, affection, or assistance which belongs to her. And for such unlawful act the wife is entitled to be remunerated in damages. It follows, then, in the case at bar, that if the defendant could show that others than herself had also been guilty of alienating the affection of the plaintiff's husband to any extent, although this fact was unknown to the plaintiff, she had the

right to do so in mitigation of damages. Wolf v. Frank, 92 Md. 138.

An examination of the evidence in the case shows that up to the time when the plaintiff's husband went away with the defendant he furnished her with a comfortable support, paying over to her his entire wages, and contributing generally to her comfort and happiness; but that after the defendant interfered in the premises, and won his affection, he absolutely neglected the plaintiff, giving her no money for food or clothing, so that she was obliged to procure the necessaries of life as best she could. It also appears by the uncontradicted testimony in the case that the plaintiff and her husband were fond of each other, and had no trouble, until he became acquainted with the defendant; that the latter wrote him a large number of love letters, wherein it appears that she had great affection for him—that she desired to marry him; that she made appointments to meet him in Providence and elsewhere for improper purposes; that she was unwilling that this intimacy should cease, although he desired it; and that in all these matters she was the aggressive party. In view of these facts, and of the further fact that the defendant did not personally deny any of the charges made against her, and did not even testify in her own behalf at the trial, it appears beyond question that, even if she was not guilty of alienating the affections of the plaintiff's husband as a whole, yet she was the main cause thereof. And hence, while a new trial must be granted on account of the error of the trial court in ruling out the evidence which was offered in mitigation of damages, as aforesaid, there is no occasion for a new trial on the merits of the case, and we will therefore grant a new trial, the same to be limited to the question of damages only.

Case remanded for a new trial in accordance with this opinion.

SHANNON *v.* SWANSON.

Illinois, 1904. 208 Ill. 52.

Boggs, J. This was an action on the case, brought by the defendant in error against the plaintiff in error for the seduction and alienation of the affections of Louise Swanson, wife of the defendant in error, by the plaintiff in error. On the trial before the court and a jury, judgment was entered in favor of the

defendant in error in the sum of $1,000, and the judgment was affirmed by the Appellate Court for the Second District. The record is before us on a writ of error. * * *

A husband is entitled to recover substantial damages from one who has committed adultery with his wife, although he proves no resulting expense or loss of services (Yundt v. Hartrunft, 41 Ill. 9; 8 Am. & Eng. Ency. of Law [2d Ed.] 266), and this answers the complaints as to instructions Nos. 2 and 6.

It is complained that instruction No. 3 contains an assumption that the plaintiff in error had been guilty of adultery with the wife of the defendant in error, and, as to the fourth instruction, that it assumes the relations between the husband and wife were cordial and affectionate. Both of the instructions are so drawn as that they are likely to provoke the criticism made against them. The purpose of instruction No. 3 was to advise the jury of the general legal principle that the fact that a husband has forgiven the conduct of an adulterous wife does not relieve the seducer of the wife from legal liability to answer in damages to the husband, and the language found in an opinion of the Supreme Court of New Hampshire announcing that doctrine was framed into the instruction. In the concluding portion of the instruction the phrase, "if any you find from the evidence," clearly refers to the words "offenses of the defendant," found immediately preceding such phrase, and would, we think, prevent the jury from being misled to believe the court assumed it to be true, or to have been proven, that defendant had committed the offense of adultery. There is no assumption of fact in the fourth instruction. Whether the relations between the husband and wife were cordial and affectionate was left by it to be determined by the jury from the evidence.

The fact that Parker Shannon, a brother of the plaintiff in error, had also had intercourse with the wife of the defendant in error, and that the defendant in error had instituted an action against him, and in settlement of the suit had received the sum of $1,000 from Parker, and had executed a release of the cause of action against Parker, did not bar the action against the plaintiff in error, or make it incumbent upon the trial judge to grant the motion for an instruction directing a peremptory verdict for the defendant. The acts of adultery of Parker Shannon and of the plaintiff in error were separate and distinct acts, and not one act or wrong, and no right of action accrued against

them jointly. There being no joint liability, the doctrine that satisfaction by one joint tort feasor bars recovery against all other of such tort feasors has no application. Yeazel v. Alexander, 58 Ill. 254; Chicago & Northwestern Railway Co. v. Scates, 90 Ill. 586. The judgment is affirmed.

Judgment affirmed.

In actions of tort, and certainly in crim. con., the amount of damages is peculiarly within the discretion of the jury, so that appellate courts will disturb the verdict only where passion and prejudice are shown. Speck v. Gray, 14 Wash. 589.

In crim. con. the deprivation of services is not one that implies a loss measurable by pecuniary standards of value. The husband is entitled to "consortium" or conjugal fellowship. If statutes give the wife her own earnings that makes no difference with the husband's claim. Long v. Booe, 106 Ala. 570.

If the love and harmony and affectionate intercourse of husband and wife had been previously impaired through the misconduct of the husband, this may be shown in mitigation of damages, if pleaded. Palmer v. Cook, 7 Gray 418.

VII. BREACH OF PROMISE TO MARRY.

KELLERT *v.* ROBIE.

Wisconsin, 1898. 99 Wis. 303.

WINSLOW, J. This is an action for breach of promise of marriage, and the plaintiff has obtained a judgment for damages fixed at $3,500. The contract of marriage was admitted, but the defendant claimed that there was a subsequent mutual release. This was denied by the plaintiff, and upon this issue the case was tried. The evidence showed that the parties became engaged August 30, 1890, the plaintiff then being twenty years of age; and it was agreed that the marriage should not take place for three years. The parties were farmers' children, and lived with their parents in adjoining towns in Winnebago county, about a mile and a half from each other. After the engagement, the defendant frequently called upon the plaintiff until December 17, 1893, at which time the defendant claims that the plaintiff suggested to him that, as long as his (defendant's) people were opposed to the match, they should separate, and call the engagement off, and that he assented to this proposition. The defendant never called on the plaintiff after this time, although they had some correspondence, which is in the record. Soon after this alleged conversation, the defendant commenced to call upon another young lady in the neighborhood, and continued to pay attention to her without objection on the part of the plaintiff, until he was married to her in December, 1895. The plaintiff denied positively that she released the defendant from the engagement. In the course of her examination as a party under section 4096, Rev. St., she admitted that they had a conversation in December, 1893, in which she says, "I told him if he did not want to marry me, of course he could suit himself; but he said he was marrying me, not his people, and he came to see me just the same." The evidence showed that the defendant was worth about $6,000, composed of his interest in the estates of his father and grandfather, both of which were still unsettled.

Several exceptions to rulings upon evidence and to the charge

of the court were argued by the appellant, but, as we do not think we should be compelled to reverse the judgment on account of them alone, we shall not discuss them, but proceed to the main question, namely, whether the verdict is contrary to the evidence. Upon this question, after careful consideration of all the evidence, and especially of the letters written by the plaintiff after the alleged release, we can come to no conclusion except that the verdict is clearly against the preponderance of the evidence. These letters demonstrate to a certainty that something of a serious nature had interrupted the relations of the parties about the time that the defendant alleges the release took place. No explanation as to what this serious event was is offered except the defendant's explanation of a release. We shall not give the letters in full, but content ourselves with some extracts, which seem to conclusively establish that the former relationship was broken off, and that marriage was no longer contemplated. In a letter of January 21, 1894, she says: "Fred: If you desire a change, why take it, and end the matter right here. As I said previously, I cannot count second. I am glad of one thing: if we do separate forever, you can always think that I performed my duty by you from the very first to the last." On March 1, 1894, she wrote: "Fred: You may think it queer on my part in asking you to come and see me, after what has happened. I would never do so if it were not absolutely necessary, Fred; that you know. I know it will cause hard feelings, but I cannot help it. You must know, and the sooner the better. So let me see you as soon as possible. If I have done wrong in writing, please forgive me, Fred; it is for your and my welfare." On March 8, 1894, she wrote again: "I just want you to come just once, and risk everything to oblige me. Your trouble is as nothing compared to mine. I knew you were in town Monday. I seen your horse, and someway I felt you were there. I don't feel hard toward you one bit, Fred. You will find me just the same. I am not fickle; once is forever with me; so don't feel bad about nothing. You shall never suffer through me again. I hope the day may come when you forget that you ever knew me. * * * Now, Fred, if you don't want to come, and if you think you will be happier by staying away, why I will try and bear it." When the plaintiff said to the defendant in her letter of January 21st, "If you desire a change, take it, and end the matter right here," we can see no escape from the conclusion that it was an

offer of freedom from the engagement; and when it further appears that the defendant acted upon this or a similar offer, and, without objection from the plaintiff, but with her knowledge, courted and married another woman, it must be considered that the offer was accepted, and that the plaintiff has become bound by the offer and its acceptance. We are unable to understand how, in the face of this evidence, the jury could have found that there was not a mutual release of the engagement. In connection with this unaccountable verdict, we cannot refrain from saying that the damages awarded are grossly excessive, and that we should feel obliged to reverse upon this ground in any event. The defendant's estate amounted to about $6,000, and there are no circumstances of aggravation in the case. The defendant is now married, and to give considerably more than half of his property as damages upon the facts appearing here, even if there had been no express release, we regard as out of the bounds of reason. The damages are so far excessive as to show passion, if not perversity, on the part of the jury.

Judgment reversed, and action remanded for a new trial.

ROBERTS *v.* DRUILLARD.

Michigan, 1900. 123 Mich. 286.

HOOKER, J. In an action for breach of promise of marriage, the court permitted plaintiff's counsel to prove various slanderous statements concerning the plaintiff, made by the defendant to third parties at different places and times, after the relations had ended, in the absence of the plaintiff, as a reason for breaking his engagement and refusing to marry her. There is no doubt that this testimony was admissible under authorities hereinafter cited, but an improper use was made of it. The court instructed the jury that "therefore, if the jury find from the evidence that the defendant wantonly, recklessly, and unjustifiably broke off his engagement with the plaintiff, and you further find from the evidence that in order to excuse himself for so doing he made statements regarding her physical condition which would bring her into even greater ridicule and contempt than the mere breaking off of the engagement would do, and the tendency of which would be to disgrace her and ruin her future prospects and welfare, and you further find from the evidence that such statements

were untrue, and that the defendant knew or had good reason to believe them to be false and untrue, and made such statements in bad faith, then you should, in the exercise of a sound and reasonable discretion, award her such additional damages as in your judgment she has suffered by reason of the false and slanderous statements so made by the defendant." This language was broad enough to lead the jury to understand that they could award full damages for these slanders to the same extent as would have been permissible had the various slanders been counted upon in an action for defamation. It has been said that the testimony was admissible, but it was only for the purpose of showing a bad motive, by way of aggravation of damages, just as willfulness and malice may be shown in a case of tort, to which this class of cases are by the authorities cited said to be analogous in some respects. The proof of these slanders was admissible, not as substantive causes of action, but as explanatory of the act of the defendant in breaking the contract, just as a libel not declared upon is admissible to explain the animus of a defendant in publishing the libel counted upon in an action for defamation. An examination of the authorities will show this. In those jurisdictions where punitory damages are permitted, the rule is that these slanders may be shown as a basis for them. Sutherland says, in his work on Damages (section 987), that circumstances are admissible to show wantonness and ruthlessness, and that she may be allowed, not only full compensation (i. e., for the breach of promise, not slander), but by way of punishment. There is nothing in the quotation from Sutherland cited which in my opinion justifies the inference that compensation for the direct injuries occasioned by such slanders are recoverable in the action for breach of promise, or that they may not be recovered in an action of slander, despite a previous recovery of legitimate damages in an action for the breach of promise of marriage. In Southard v. Rexford, 6 Cow. 261, the court went no further than to say that a slanderous defense is a circumstance that may aggravate damages. In Kniffen v. McConnell, 30 N. Y. 291, 292, this is the interpretation put upon the opinion in Southard v. Rexford, and it is said that such rule is an anomaly, and "should not be extended further than that case has carried it." These cases are reviewed in Thorn v. Knapp, 42 N. Y. 474, showing that these cases stand upon the proposition that, "in an action for breach of promise of marriage, it is competent, for the purpose of

enhancing the damages, to prove the motives that actuated the defendant; that he entered into the contract and broke it with bad motives and a wicked heart." In Johnson v. Jenkins, 24 N. Y. 252, Judge Allen clearly shows the use to be made of such evidence. He says: "Every circumstance attending the breaking off of the engagement becomes a part of the *res gestae*. The reasons which were operative and influential with the defendant are material, so far as they can be ascertained; and whether they are such as, tending to show a willingness to trifle with the contract and with the rights of the plaintiff, should enhance the damages, or, on the contrary, showing a motive consistent with any just appreciation of and regard for his duties, should confine the damages within the limit of a just compensation, will always be for the jury to determine. * * * Had the defendant by his declarations shown a wicked mind in the transaction, it is evident that they very properly would have been submitted to the jury further to enhance the damages." "Suppose he had told the plaintiff, at any time before the trial of the action, that he had discontinued his visits and broken the contract because she was a prostitute; could she not, upon the same principles, have proved this in enhancement of damages? No damages could be allowed for defaming her by the utterance of these words; but they could be proved as showing the mind with which the contract was broken, and as thus bearing upon the damages to be allowed for that." Thorn v. Knapp, 42 N. Y. 479. In Chellis v. Chapman, 125 N. Y. 214, the same doctrine is adhered to, viz., that the damages may be enhanced by proof of breach of contract from bad motives. In Sherman v. Rawson, 102 Mass. 399, the court said: "Damages, it is true, must be awarded solely for the suffering which would result from the defendant's refusal to perform his promise,"—adding that they cannot be justly estimated without taking into consideration the circumstances of the relation and the breach. Baldy v. Stratton, 11 Pa. St. 325, goes no further, and we have not found a single case that permits full recovery for such slanders as are proven in this case in an action for the breach of promise, or that holds that an action for slander is barred by a judgment upon the breach of promise. The judgment should be reversed, and a new trial ordered. The other justices concurred.

SALCHERT *v.* REINIG.

Wisconsin, 1908. 135 Wis. 194.

Action for breach of promise to marry, alleged to have been made about the 1st of August, 1902, aggravated by seduction accomplished in reliance upon said promise, and followed by nearly three years of frequent illicit connection between the parties. The defendant denied any promise of marriage, but admitted the establishment and continuance of such illicit relations upon the basis of a cash payment on each occasion thereof. The answer pleaded was a simple general denial. The jury, by special verdict, found that about the 1st of August defendant did offer or promise to marry the plaintiff, and that she accepted the offer; that said offer or promise was not conditioned upon sexual intercourse or upon her becoming pregnant by him; that plaintiff held herself ready and willing to marry the defendant until his wedding with another woman in April, 1906; that the time between the making of such promise and said April, 1906, was a reasonable time for the engagement to continue without marriage taking place; assessed the damages for breach of promise, regardless of any question of seduction, at $10,000; and by the eighth answer found that the defendant seduced the plaintiff "under such promise;" and by the ninth answer that the damages by reason of the seduction was $5,000. Motions for nonsuit and for direction of verdict in favor of defendant were duly made and overruled, with exception, and, after verdict, motion was made to change the answers of the several questions and to render judgment for the defendant, and if that be denied that the verdict be set aside, and a new trial granted; all of which motions were denied, over exception, and judgment rendered for both sums of damages included in the special verdict, to wit, $15,000, from which judgment the defendant appeals.

DODGE, J. Appellant's most urgent contention is that the trial court erred in refusing to direct verdict for defendant, or to insert answers in the special verdict negativing the promise of marriage, and that he also erred in not setting aside that verdict as opposed by great weight and preponderance of evidence. The action of a trial court in the second respect is an exercise of discretion with which the appellate court will not interfere. Although convinced that some credible evidence supports the verdict, if the trial judge is persuaded that such evidence is rela-

tively so weak or unconvincing, when compared with the adverse evidence, that there is danger that the verdict will work injustice, he is vested with a broad discretion to protect against such peril by granting the parties a new trial. Bannon v. Ins. Co., 115 Wis. 250; Peat v. Ry. Co., 128 Wis. 86. But when this stage has been passed, the question whether the court should direct a verdict, or whether this court on appeal may in effect do so, depends merely upon whether there is any credible evidence which, in the most favorable view, and granting all reasonable inferences and construction in favor of the conclusion of the jury, tends to support the verdict. To declare sworn testimony of a fact incredible we must be convinced that it is so in conflict with the uniform course of nature or with fully established physical facts that no reasonably intelligent man could give it credence. Beyer v. Ins. Co., 112 Wis. 138; Hirte v. Eastern Wis. Ry. & L. Co., 127 Wis. 230; Peat v. Ry. Co., 128 Wis. 86. In this case the plaintiff testified positively to the fact of a promise of marriage, and of course this suffices of itself to support the verdict on that subject, unless rendered incredible by other evidence in the sense above stated. No corroboration is required. Giese v. Schultz, 65 Wis. 487. It is opposed in the first instance by the categorical denial of the defendant, but this simply presents a case of two conflicting witnesses, one or the other of whom may be credited by a reasonable person according to their appearance, interest, fairness, and manner of testifying. While the plaintiff is involved in some measure of contradiction as to the details of the interview in which the promise was made, so also is the defendant's testimony permeated by contradictions, uncertainty, and evasion. Throughout his examination, under section 4096, Stat. 1898, through many consecutive answers relating to the most material events he contented himself with denying memory or knowledge, and later testified thereto fully and in detail, thus placing his testimony at one time in direct contradiction therewith at another. Again, there is the asserted improbability that a man in his rank of life would engage himself in marriage to the plaintiff, and there is conduct on her part considered by the defendant's attorney as variant from that which usually accompanies the relations between engaged persons. But we can see nothing in this more than mere improbability, and not enough to make it impossible for an ordinarily intelligent person to believe in the existence of the promise of marriage notwithstanding

such conduct. The unsavory character of the evidence descriptive of the relations of the parties must make it suffice to state our conclusion that after careful examination thereof we cannot deem any of the facts disclosed as so inconsistent with plaintiff's testimony as to this promise as to render it so incredible that it might not by reasonable men be believed, and so that it obviously furnishes support for that part of the verdict. * * *

We cannot think the contention that the damages are excessive worthy of extended consideration by the appellate court after adverse ruling below. Ten thousand dollars for the loss of a marriage to a man of the wealth which evidence at least tended to ascribe to the defendant, after an engagement of some four years, is well within the limits of verdicts which have been sustained. The translation into terms of money of those peculiarly indefinite damages which result from a breach of such a contract is so a matter of estimate that courts on appeal are extremely reluctant to interfere with the conclusion of the jury thereon.

We have gone over all the assignments of error relating to those portions of the recovery other than for seduction, at least so far as seems to be justified by their importance, and find none which can in our opinion warrant any reversal up to the point of the recovery of damages for the breach of promise unaffected by consideration whether the seduction of the plaintiff was accomplished in reliance upon the promise of marriage. When the court came to the question of seduction, he instructed the jury that if they found it they should, in answer to the ninth question, fix such sum as will compensate her for the additional injuries resulting from the seduction which would include loss of virtue, injury to reputation, and her mental suffering following from such loss and such injury, and this too after directing them to include, in response to the seventh question, the amount of her damages for the breach of the promise of marriage independent of seduction, the elements of which he described as "benefits and advantages lost to her by the defendant's breach of the contract, together with such sum as will compensate her for such humiliation and mental suffering as resulted from defendant's rejection and repudiation of her." The ninth question could have been no broader had plaintiff in form stated two causes of action in her complaint, one for breach of promise, and another for seduction as an independent cause of action. But by the common law, which has received no modification by statute in

Wisconsin, though it has in some states, the seduced party has no cause of action for seduction. She is a consenting party, and the policy of the law has been to give her no recovery, no matter how her consent is obtained, for seduction as such; leaving the seducer to be dealt with under the criminal law when he is brought within its terms. In the two cases in this state, which are cited as authority in nearly all text books, Leavitt v. Cutler, 37 Wis. 46, and Giese v. Schultz, 53 Wis. 462, *Id.* 65 Wis. 487, and *Id.* 69 Wis. 521, this view was most distinctly pointed out, and while in Leavitt v. Cutler there were mentioned as elements of damage for breach of promise such things as the "loss of virtue" and the "injury to reputation," with an expressed doubt whether they belonged there, it was declared that the fact of seduction could bring in no additional element of damage, but at most might serve to enhance the amount of those elements which, independently, belonged in the action for breach of promise. Just what those elements are, and whether they include loss of reputation, is left in doubt by the Wisconsin cases. In Coolidge v Neat, 129 Mass. 146, they are defined as follows: (1) "The disappointment of the plaintiff's reasonable expectations * * * including 'the money value of worldly advantages of a marriage which would have given her a permanent home and an advantageous establishment.'" (2) "The wound and injury to her affections." (3) "Whatever mortification or distress of mind she suffered, resulting from the refusal of the defendant to fulfill his promise." Whether there may be any other elements is immaterial to the present case, for the trial court defined the elements for which damages might be allowed for the breach of promise: "The benefits and advantages lost to her by the defendant's breach of the contract, together with such sum as will compensate her for such humiliation and mental suffering as resulted to her from defendant's rejection and repudiation of her." Now, under the rule of Giese v. Schultz, the utmost effect of her seduction would have been under this rule of the trial court to enhance the sum which the jury might have thought would compensate her for one or the other of these elements, and, obviously, it was not so limited by the instruction given, which authorized compensation for the "additional injury resulting from seduction." That is in direct disregard of the rule of this court, and must be considered error, the effect of which

on the judgment, however, need not be considered by reason of a more radical objection now to be stated.

In the finding (No. 8) as to whether or not seduction had taken place the court left to the jury whether the plaintiff had ever had sexual intercourse, otherwise than by force and against her will, with any man prior to the promise of marriage. He subsequently concluded that this was too restrictive, and declined to set the verdict aside, although not supported by evidence under that rule, holding that one act of sexual intercourse could not be said to render a woman unchaste. This opens a broad field of inquiry, full perhaps of close distinctions. But the general rule of law seems to be, from the weight of authority, that although a woman may at one time have lapsed from physical chastity, if it appear affirmatively that she has reformed and at the time of the offense maintained a habit of sexual virtue, she may be deemed chaste within the meaning of the law, so that an invasion of that virtue under a promise of marriage may serve in greater or less degree to enhance the damages she would suffer by a breach. Suther v. State, 118 Ala. 88; Smith v. State, 118 Ala. 117; Smith v. Milburn, 17 Iowa, 30; People v. Clark, 33 Mich. 112; People v. Squires, 49 Mich. 487. We do not, however, in the present case, need to discuss the exact lines of this doctrine. If it appear that a woman has willingly associated herself in the sexual act with a man other than her husband, in a manner and by conduct which excludes the existence of any barrier of virtue or chastity of character needing to be overcome by seductive arts, and that she continued such intercourse at short intervals without suggestion of any repentance or reformation or other break in its continuity, the mere fact that in the course thereof, and after the illicit relations are established, there intervenes a promise of marriage cannot support a finding that the seduction has been accomplished by such promise, although she may testify that she continued the libidinous relations by reason of it. It is seduction by promise of marriage which justifies enhancement of damages, not merely sexual intercourse. The latter may be the result of inclination, passion, or cupidity without entitling the woman to any reward by law. People v. Clark, 33 Mich. 112; Patterson v. Hayden 17 Or. 238; Bowers v. State, 29 Ohio St. 542; State v. Brassfield, 81 Mo. 151; Comer v. Taylor, 82 Mo. 341; Stowers v. Singer, 113 Ky. 584; Hogan v. Cregan, 6 Rob. (N. Y.) 138. In the present case it is established, without dis-

pute, that on at least one and perhaps two occasions the plaintiff and defendant associated in a sexual encounter before any talk of marriage. The circumstances surrounding the first of these are detailed by the defendant, and show a most ready joining therein by the plaintiff—true, with no words of consent, but by acts of preparation and co-operation which are fully the equivalent thereof and evincive of entire familiarity with and inclination to the act. This testimony stands undisputed, except by the plaintiff's negative answer to a leading question, over objection: "Did you ever consent to allow Mr. Reinig to have sexual intercourse with you before he promised to marry you?"—which is far too much a mere conclusion of the witness and evasive of the real facts to constitute any denial of the specific description of her conduct given by the defendant. This act of voluntary and willing intercourse within a very few days before the time when it is claimed the promise of marriage was made, and the entire resemblance to it of the subsequent conduct of the plaintiff in joining with the defendant in sexual intercourse, none of which were coincident in time with the promise, make it to our minds an entirely uncontradicted fact that her yielding was in no wise induced by or dependent on the promise of marriage, and that the finding of the jury to the eighth question was wholly unsupported. The court should upon defendant's motion, have reversed the answer to that question, or indeed, preferably, should have declined to submit it to the jury. The conclusion thus reached does not affect the rest of the verdict. The error of the court can now be corrected by eliminating from the recovery all that portion which depends upon the answers to the eighth and ninth questions.

Judgment modified by reducing the damages to the sum of $10,000, and, as so modified, is affirmed. Appellant to recover costs in this court.

VIII. ACTIONS AGAINST TELEGRAPH COMPANIES.

PRIMROSE *v.* WESTERN UNION TELEGRAPH COMPANY.

United States Supreme Court, 1894. 154 U. S. 1.

This was an action on the case, brought Jan. 25, 1888, by Frank J. Primrose, a citizen of Pennsylvania, against the Western Union Telegraph Company, a corporation of New York, to recover damages for a negligent mistake of the defendant's agent in transmitting a telegraphic message from the plaintiff at Philadelphia to his agent at Waukeney in the State of Kansas.

The defendant pleaded: 1st, not guilty; 2d, that the message was an unrepeated message, and was also a cipher and obscure message, and therefore by the contract between the parties under which the message was sent the defendant was not liable for the mistake. * * *

GRAY, J. The plaintiff introduced evidence tending to show that he had suffered a loss of upwards of $20,000. * * * Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in Western Union Tel. Co. v. Hall, 124 U. S. 444. * * *

The learned justice here reviews Hadley v. Baxendale and continues as follows:

In Sanders v. Stuart, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiffs' correspondent in New York as

giving a large order for goods, whereby the plaintiffs lost profits, which they would otherwise have made by the transaction, to the amount of £150, Lord Chief Justice COLERIDGE, speaking for himself and Lords Justices BRETT and LINDLEY, said: "Upon the facts of this case we think that the rule in Hadley v. Baxendale applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be, if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;' for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz., the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally, i. e., according to the usual course of things, from the breach' of such a contract as this." 1 C. P. D. 326, 328; 45 Law Journal (N. S.) C. P. 682, 684.

In United States Telegraph Company v. Gildersleve, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the Court of Appeals of Maryland, and applying the rule of Hadley v. Baxendale, above cited, said: "While it was proved that the despatch in question would be understood among brokers to mean fifty thousand dollars of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars, as fifty thousand dollars, by those not initiated. And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the

case, it would certainly follow that the nature of this despatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the despatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Maryland, 232, 251.

In Baldwin v. United States Tel. Co., which was an action by the senders against the telegraph company, for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the Court of Appeals of New York said: "The message did not import that a sale of any property, or any business transaction, hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher, or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance." "The despatch not indicating any purpose other than that of obtaining such information as an owner of property might desire to have at all times and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other

property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752. See also Hart v. Direct Cable Co., 86 N. Y. 633.

The Supreme Court of Illinois, in Tyler v. Western Union Tel. Co., took notice of the fact that in that case "the despatch disclosed the nature of the business as fully as the case demanded." 60 Illinois, 434. And in the recent case of Postal Tel. Co. v. Lathrop, the same court said: "It is clear enough that, applying the rule in Hadley v. Baxendale, *supra*, a recovery cannot be had for a failure to correctly transmit a mere cipher despatch unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying that it can contain no information of value as pertaining to a business transaction; and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss." 131 Illinois, 575, 585.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. (Citing authorities.)

In the present case, the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contempla-

tion of both parties, when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the Circuit Court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message.

Judgment affirmed.

Mr. CHIEF JUSTICE FULLER, and Mr. JUSTICE HARLAN, dissented.

McPEEK *v.* WESTERN UNION TELEGRAPH CO.

Iowa, 1899. 107 Iowa, 356.

LADD, J. September 20, 1896, after mortally wounding John Finley, the marshal of Morning Sun, Orman McPherson fled. A few days later the plaintiff saw his wife, who promised to assist him in procuring the arrest of her husband. McPeek obtained McPherson's pension papers from Keithsburg, Ill., for her; and she advised him (being in secret correspondence under an assumed name) of having these, and he came to her room at the hotel at Morning Sun, where she was employed as cook, October 22, 1896, at about 10 o'clock p. m. (having so arranged earlier in the evening), and there remained until between 3 and 4 o'clock the following morning. Before coming in, he gave up his revolvers, and she placed them in a bureau, where they remained during his stay. She had agreed to write to McPeek when she expected her husband, but, if he came unexpectedly, then to telegraph him. At about 7 o'clock p. m. of the 22d, she delivered to the defendant's agent at Morning Sun this telegram: "E. E. McPeek, Winfield: Come on first train. Answer. M. E. M.—" telling him she wanted it "sent right away and delivered and wanted an answer." * * *

Ridgway, the agent at Winfield, usually closed his office at 6 o'clock, but was ordinarily at the station at about 9 o'clock. He received the message at 9:15 o'clock p. m., and carried it to the plaintiff's house, reaching there at about 9:30. After repeatedly rapping on the door, and being unable to arouse anyone, as he says, he placed the message over the door knob, with the end of the envelope between the door and the jamb, where it was found the next day at between 9 and 10 o'clock a. m. It seems the agent supposed the family was away from home and

would find it upon their return. * * * The only train * * * leaving Winfield for Morning Sun * * * left the former place at 6 o'clock a. m. McPeek told Ridgway he was making an effort to capture McPherson, and might get a telegram from Morning Sun concerning the matter. * * *

On the 21st day of October, 1896, the governor of Iowa, by proclamation, offered a reward of three hundred dollars for the arrest of McPherson, and his delivery to the proper authorities. The plaintiff's action is based on the allegation that he lost this reward through the negligence of the defendant in not delivering the message on the evening of October 22d. * * *

III. It is insisted that the damages were remote, and not such as either party might have contemplated from the wording of the message. But extrinsic evidence was admissible to show that defendant had notice of the importance of the message. Cable Co. v. Lathrop, 131 Ill. 575 (23 N. E. 583), Telegraph Co. v. Edsall, 74 Tex. 329. The appellant argues the case on the theory that the action of plaintiff is for the breach of contract. He made no contract with the defendant. This is conceded by appellant in its opening argument, and denied in its reply. The first impression was undoubtedly the correct one. The contract was with the sender of the message, and whether recovery might be had for breach thereof, because made for plaintiff's benefit, we need not determine. This action is based on the negligence of the defendant in the performance of a duty in its public capacity as a common carrier of messages. In all such actions, sounding in tort, the injured party is not limited to damages which might reasonably have been within the contemplation of the parties, but recovery may be had "for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force." Mentzer v. Telegraph Co., 93 Iowa, 757. [Here the learned justice cites many authorities.]

There was evidence tending to show that immediate delivery was requested and that the agent at Winfield knew that McPeek was expecting a message, that it would relate to the capture of McPherson, and that prompt delivery was required. If so, while he may not have known of the reward being offered, he may well be credited with understanding that McPeek was putting forth his efforts to accomplish a purpose from which he anticipated some benefit to accrue to himself. The law authorizes the offer-

ing of such rewards, and it is not too strict a rule to hold the defendant responsible for such losses as may reasonably be anticipated to follow its negligence, whether informed definitely what these may be or not. It was charged with knowledge that such a reward might be made, and it might reasonably reckon on such a contingency, in omitting its duty with reference to such a message. Nor was the plaintiff advised that the reward had actually been offered on October 22d, though he understood it would be, and was acting to secure this and others proposed by local officers. That the omission of the defendant caused greater loss than he then supposed, does not affect its liability, or his right of recovery. Certainly the loss of the reward was the direct result of the failure to arrest and deliver McPherson to the proper authorities, for this was the very condition of its payment.

IV. The burden was on the plaintiff to prove that in all reasonable probability the loss resulted from the negligence of the defendant. Hendershott v. Telegraph Co., 106 Iowa, 529. Had the plaintiff proceeded by team to Morning Sun, with the assistance of the two constables and another, there seems no good reason to doubt that he would have arrested McPherson, who had been disarmed by his wife. This is not absolutely certain, for many contingencies may be supposed, which could have intervened. While these might well be considered, they do not warrant us in saying that these men would not have accomplished that which has often been done before, and which is ordinarily done by officers in like situation. Whether they would in all probability have succeeded, was for the jury to determine.

V. It is suggested that as the train did not go until 6:06 in the morning, even if the message had been delivered the plaintiff could not have reached Morning Sun in time to make the arrest. But the plaintiff had made every arrangement to go by team. The message was understood by the plaintiff to require immediate attention owing to his agreement with Mrs. McPherson.

* * *

We discern no error in the record, and the judgment must be affirmed.

WESTERN UNION TELEGRAPH CO. *v.* NYE.

Nebraska, 1903. 70 Neb. 251.

ALBERT, C. This action was brought by the Nye & Schneider Company against the Western Union Telegraph Company to recover damages sustained by the former by reason of the negligent delay of the latter in transmitting a telegram. It sufficiently appears from the pleadings and the evidence that the plaintiff, whose home office is at Fremont, had a branch office at Morehead, Iowa, where it was engaged in the grain business. On the 13th day of June, 1901, plaintiff's agent in charge of the business at the latter place had a cash offer of 35 cents per bushel for 5,000 bushels of corn, which the plaintiff had on hand at that point, which was to stand open for acceptance until 7:30 p. m. of that day. The agent communicated the offer to the plaintiff at its home office. On receipt of such communication, the plaintiff, on the same day, delivered a message to the defendant, for transmission to the agent of the former at Morehead, Iowa, directing him to accept the offer. Had the defendant used due diligence in the transmission of the message, it would have reached the agent in time to enable him to take advantage of the offer and close the sale before the time for which the offer was to hold good expired. But by reason of the negligent delay in the transmission, it did not reach him until after 7:30 of that day, in consequence whereof the plaintiff failed to make the sale. Had the offer been accepted within the time fixed, the party making the offer would have paid the price in cash, and the corn would have been delivered to him at Morehead. The market value of the corn on that day, and for sometime thereafter, was 32 cents per bushel. Afterward the price advanced, so that, between the 24th day of June and the 5th day of November following, the plaintiff disposed of the corn at retail at a higher price than that specified in the offer hereinbefore mentioned. A trial to the court without a jury resulted in a finding for the plaintiff; the court adopting as the measure of damages the difference between the price offered for the corn on the 13th day of June, 1901, and its market value at Morehead on that day, and gave judgment accordingly. The defendant brings error.

The defendant contends that the measure of damages adopted by the trial court is erroneous, as applied to the facts in this case, because the plaintiff, having eventually sold the corn at a

higher price than that accepted by the message in question suffered no loss, and therefore sustained no actual damages, by reason of the delay in the delivery of the message. At first sight this contention appears reasonable, but we do not believe it will bear analysis. The action is one for breach of contract, and the breach relied upon is the failure of the defendant to transmit and deliver the message within what, under all the circumstances, would have been a reasonable time. In such cases the general rule is that, so far as it can be done by money, the injured party is to be placed in the same situation in which a performance of the contract would have placed him. But it would be impossible to follow the labyrinth of remote results and consequences of a breach of contract, and determine either the ultimate situation of the party as affected thereby, or what such situation would have been, had the contract been performed. The law, therefore, takes into account only approximate results, and disregards such as are remote, or are the product of intervening or independent causes. Hence the situation of the injured party which forms the basis of the comparison must be his situation when the breach of contract occurred, and before remote or independent causes had intervened to change it. His situation after that time can never be material as an ultimate fact in the case, because, after the intervention of such causes, it can never be known with any reasonable degree of certainty to what extent it is due to causes only remotely connected with the breach of contract, or wholly independent of it. In the present case, although it is questioned by the defendant, we think the evidence is ample to sustain a finding that the delivery of the corn and the payment of price would have followed immediately upon the delivery of the message, had it been delivered in due time. Hence, upon the failure to deliver the message, the plaintiff has 5,000 bushels of corn, which, instead of being worth $1,750, as it would have been, had the message been duly delivered, was worth only $1,600. In other words, the plaintiff's situation, upon the defendant's failure to deliver the message, and before any remote or independent causes had intervened to change it, was such that it would have required $150 to make what it would have been, had the message been delivered. The subsequent rise in the market, and sale of the corn on such market, are no more proximate results of the breach of contract or the contractual relations of the parties than a subsequent decline in the market, and sale of the

corn at a loss, would have been. The same principle that would have relieved the defendant from increased liability, had the market declined, excludes it from participation in the profits resulting from its advances. In neither case would it be possible to determine to what extent the result was due to the intervention of remote or independent causes.

Besides, as a matter of pure justice between the parties, we are satisfied that the rule adopted by the trial court is right. Had the plaintiff, immediately upon the failure to deliver the message, sold the corn at the then market price, the measure of damages, in the absence of special circumstances, would have undoubtedly been the difference between such price and what the plaintiff would have received for it had the message been delivered in due time. Every hour it held the corn after the cause of action arose was at is own risk, because it will not be claimed that the damages recoverable would have been increased by the loss or destruction of the corn or its decline in price after that time. Those are risks incident to the business of the merchant, and which he takes into account in estimating his profits and deciding upon a cause of action. Holding the corn for a better market also involved interest on the capital invested, storage, the negotiations of another sale, and other outlays, to say nothing of the foresight and energy necessary to conduct the venture to a successful issue. Is there any good reason why the defendant, who risked nothing, invested nothing, and did nothing in the venture, should be permitted to share in the profits? We think not. We are aware that a different conclusion was reached in Houston E. & Tel. Co. v. Davidson (Tex. Civ. App.), cited by defendant; but it is not supported by any line of reasoning, nor is it entirely clear that the point was necessarily involved in the case. But however that may be, it does not commend itself to us as a sound rule of law, and we must therefore decline to follow it. The defendant also cites Michalwait v. Western Union Tel. Co. (Iowa) 84 N. W. 1038. In that case a buyer delivered a message to the defendant, a telegraph company, for transmission to the plaintiff, which contained an offer to pay 20½ cents per bushel for corn. Through a mistake of the defendant, the message, when delivered to the plaintiff, read 21½ cents per bushel. On receipt of the message the plaintiff went into the market and filled the order, paying 21 cents per bushel for a part of the corn, and 20 cents for the balance. The purchaser refused to pay more than 20½ cents

per bushel for the corn, and it was delivered to him at that price. In passing on the case, WATERMAN, J., said: "Plaintiffs claim a loss of profits. If this were a case where loss of profits might be considered, still we think they could not recover. The mistake in the message caused them no loss of profits, for, if it had been correctly transmitted, they would have been in the same situation they now are. They obtain from Russell the exact price fixed in his message, and as it should have been sent. There is no showing that the work of procuring the corn was worth more than the margin of profit received." We think that case is clearly distinguishable from the one at bar, and is not in point. In that case there was nothing to show that the plaintiffs would have been in any better position, had the message been correctly transmitted. It does not appear that they paid any more for the corn to fill the order by reason of the mistake, nor that by reason of the mistake they did anything they would not have done, had it not occurred. Hibbard v. Western Union Tel. Co., 33 Wis. 558, is another case cited by the defendant. The reasoning in that case seems to us to tell against the defendant, and to support the conclusion heretofore reached by us in the present case. The same may be said of Western Union Tel. Co. v. Hall, 124 U. S. 144, and Squire v. Western Union Tel. Co., 98 Mass. 232.

But the defendant further contends that the plaintiff did not learn of the failure of the sale by reason of the non-delivery of the message until some three days more thereafter, and that, under such circumstances, it was necessary for the plaintiff to show the value of the corn at the time it learned that the sale had thus failed. In support of this contention the Texas case above referred to is again cited. We do not deem it necessary in this case to determine whether the rule hereinbefore approved would be affected by such circumstances, because, were we to adopt the modification suggested, the result in this case would be precisely the same. The plaintiff is a corporation, and acts only through its agents. Its agent at Morehead, through whom the negotiations for the proposed sale were conducted, the moment the message was not delivered within the required time, knew that the sale had failed. What he knew, the plaintiff knew. Hence the failure of the sale, and knowledge on the part of the plaintiff that it had failed, were contemporaneous, and the mar-

ket price of the corn when the sale failed, and when the plaintiff learned that it had failed, would be the same.

It is therefore recommended that the judgment of the district court be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

DUFFIE, C. (concurring). I fully concur in the opinion of Judge ALBERT, heretofore filed in this case. The facts are sufficiently set forth in his opinion. It is earnestly insisted by the plaintiff in error that, because the Nye-Schneider Company finally succeeded in disposing of its corn at an advantage over the offer made by the proposed purchaser, it was not damaged by the failure of the defendant in error to transmit and deliver the message accepting the offer. On the contrary, it is said that the Nye-Schneider Company profited by the neglect of the plaintiff in error, and was benefited thereby. It has also been suggested that, before the defendant in error could recover, it should have disposed of the corn on the market at the best price which could be obtained, and that, until such sale was made, no cause of action accrued to it. I am not disposed to accept these views. Had the message accepting the offer been promptly delivered, a sale of the corn at a price 1½ cents above the market value would have been consummated on the evening of June 13, 1901. A failure to deliver the message prevented the sale, and the consequence was that the defendant in error had on hand 5,000 bushels of corn, which would otherwise have been disposed of at a profit of $75 above the market price at that date. It is clear, therefore, that on the evening of June 13th it had been damaged to the extent of $75. A right of action accrued to it immediately for this amount. We know of no principle which would deprive it of this right of action, or which would give the plaintiff in error the benefit of a rise in the corn market, or allow such advance to be shown in mitigation of damages. The rule is aptly stated by Sutherland in his work on Damages (volume 1, p. 242), where it is said: "There can be no abatement of damages on the principle of partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta.*" There appears to be a dearth of authorities on the exact question involved, but, in my opinion, the same principle and the same measure of damage should be applied that obtain in the case of a

purchaser of personal property who refuses to accept the goods purchased at the time fixed for the delivery. In such case the authorities all agree that a right of action for damges arises in favor of the vendor for the injury or loss he has sustained by reason of the breach of the contract, and this is ordinarily or generally the difference between the market value of the property at the time and place of delivery and the price fixed by the contract. Funke v. Allen, 54 Neb. 407; Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279. It is true that the vendor, on refusal of the vendee to accept, has a right, if he so elects, to resell the goods; but this seems to be a method only of ascertaining their market value, and the extent of the damages. Sutherland, in his work, has given the rule established by the decided cases, as follows: "An executory agreement which requires a subsequent acceptance of the property by the buyer to consummate the sale does not become a complete bargain and sale, so as to vest the title in him, if he refuses to take the goods. In such case the vendor is entitled to recover damages only to the extent of his actual injury from the failure of the vendee to fulfill his contract, which is ordinarily the difference between the contract price and the market value at the time and place of the breach, with interest. This may be ascertained and fixed by a resale within a reasonable time, and after notice to the vendee of the vendor's intention to resell, taking all proper measures to secure as fair and favorable a sale as possible. Such resale is made on the theory that the property is that of the vendee, retained by the vendor as a means of realizing the contract price. He acts as the agent of the vendee, and deducts from the proceeds all the expenses incurred. After notice of the vendor's intention to resell, no notice of the time and place of the resale is required to be given, but it must be made according to the usage of trade. If the net proceeds of the trade are less than the contract price, he may recover, by action on the contract, the deficiency." Benjamin, Sales, § 758, says: "When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract, as has been explained in book 2, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not, at his

pleasure. But his only action against the buyer is for damages for nonacceptance. He can, in general, only recover the damage that he has sustained, not the full price of the goods. The law, with the reason for it, was thus stated by Tindal, C. J., in delivering the opinion of the Exchequer Chamber in Barrow v. Arnaud: 'Where a contract to deliver goods at a certain price is broken, the proper measure of damages, in general, is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them.'" It is conceded that, by keeping the corn, defendant in error kept it at its own risk. In other words, had the price of corn gone down in the market, the Nye-Schneider Company would have had to bear the loss, whatever it might be, and could recover from the plaintiff in error only the difference between the price offered and the fair market value of the corn, giving it a reasonable time within which to dispose of the same. The corn being kept at defendant's own risk entitles it certainly to any advance in the price while so held. The plaintiff in error cannot claim the benefit arising solely from a risk assumed by defendant in error, and for which plaintiff in error could in no wise and under no circumstances be made liable. This principle is fairly established in Bridgford v. Crocker, 60 N. Y. 627, where it is said: "Upon the failure of the vendee to perform an executory contract for the purchase of cattle, the vendor may elect to tender the property and sue for the contract price, or to retain the property as his own and recover as his damages for the breach the difference between the market value at the time the vendee was to receive delivery and the contract price. If he elect the latter course, and the property subsequently rises in value in the market, the vendee cannot avail himself thereof, but the vendor is entitled to the benefit." A sale of the corn at an advance over the market price was lost through the negligence of the plaintiff in error. Had the defendant in error, on learning of this neglect, offered the corn on the market, and sold it for the market price, no one disputes the liability of plaintiff in error for the difference between the price so obtained and the offer made by the proposed purchaser; but, because the defendant

in error exercised its right to hold the corn at its own risk, the telegraph company claims the benefit of the advance in value which finally obtained. In other words, it seeks to take advantage of a venture in which it took no part, and of which it assumed no risk—the benefit of a hazard from which it could not be injured. The risk was that of the defendant in error, and the advantage arising therefrom belongs to it alone.

Exemplary damages are allowed, when the defendant fails to deliver a death message, when the evidence shows wanton and reckless disregard of the rights of plaintiff. W. U. T. Co. v. Gilstrap, 77 Kan. 191.

When the plaintiff sends a telegram to his brother requesting a ticket to be sent by telegraph, and when the agent was informed that the plaintiff was without means to "lay over," the defendant is liable for his suffering from cold and hunger, in sleeping out of doors, and in attempting to reach his home 400 miles distant, owing to the non-delivery of the telegram. Barnes v. W. U. Tel. Co. 27 Nev. 438.

To entitle a first cousin to damages for mental suffering from failure to attend the funeral, such suffering caused by negligence in delivering a telegram, special damages must be specifically alleged, and the telegraph company must have had special notice of the circumstances. Johnson v. W. U. Tel. Co., 81 S. C. 235. But in case of a son, prevented from attending the burial of his mother, such actual damages as result naturally from the negligence may be recovered under a general averment of damages. So Relle v. W. U. Tel. Co., 55 Tex. 308.

No damages allowed for physical pain endured during the interval between the time when the telegram summoning a physician, should have been delivered, and the time when it was actually delivered, owing to the negligence of the telegraph company. Seifert v. W. U. Tel. Co., 129 Ga. 121. See also Squire v. W. U. Tel. Co., 98 Mass. 232; Barker v. W. U. Tel. Co., 134 Wis. 147; W. U. Tel. Co. v. Hall, 124 U. S. 444; W. U. Tel. Co. v. Rogers, 68 Miss. 748.

Where a telegram announcing the death of plaintiff's grandmother was not delivered, damages for mental anguish were not allowed where there was no pecuniary or bodily injury. W. U. Tel. Co. v. Ferguson, 157 Ind. 37.

If the message is a cipher message and its importance is not disclosed, the company's liability is limited to the amount paid for its transmission. Fergusson v. Anglo-American Tel. Co., 178 Pa. 377. See, too, W. U. Tel. Co. v. Hall, 124 U. S. 444.

IX. ACTIONS UNDER "CIVIL DAMAGE ACT."

MERRINANE *v.* MILLER.

Michigan, 1907. 148 Mich. 412.

BLAIR, J. Plaintiff, the wife of John Merrinane, brought this action, in accordance with the provisions of the civil damage act, to recover damages of defendant, a saloon keeper, and his different bondsmen for three successive years, occasioned by sales of liquor to her husband. Plaintiff and her husband, then recently married moved to Grass Lake, in Jackson county, where defendant was conducting his business, in November, 1902. They were married in June, 1901, and lived at Chelsea till their removal to Grass Lake. Plaintiff's husband was a telegrapher in the employ of the Michigan Central Railroad Company, earning $50 per month, and at the time he went to Grass Lake was a sober, industrious man of excellent habits, and had $500 of his earnings in bank. In the spring, after going to Grass Lake, he began to drink moderately at defendant's saloon, of which plaintiff's brother was bartender, and prior to December, 1903, occasionally got intoxicated. On December 22d he was notified of his discharge, as follows: "Dear Sir: I enclose you time ticket for $27.44 covering 17 days' service in December, and beg to advise you that by direction of Mr. D. S. Sutherland, Div. Supt., your services are dispensed with, having proven unsatisfactory. Yours truly, E. H. Millinghok, Supt. Tel." After his discharge he drank heavily and soon became a common drunkard. They paid $7 per month house rent and from $25 to $30 per month for the support of the family out of the money in the bank until March, 1905, when the money was all gone, and plaintiff has since that time supported herself without assistance from her husband. Merrinane was night operator, his hours of duty being from 7 p. m. to 7 a. m. Plaintiff testified: "I knew he slept while he was on duty. He always had a student that knew the call, and they would call him when they needed

him. He was a fellow that couldn't sleep daytimes very much. He would try. I would often see him go to bed five or six times in one day, but he never could get used to sleeping daytimes, and he always had a student, and it didn't make much difference because they could arouse him when they needed him. * * * Did not ask Miller not to sell her husband. Witness never personally forbid Miller from selling her husband liquor. Did once through her brother, that was in March, 1905. Up to March, 1905, witness never forbid either the bartender or Miller either verbally or in writing not to sell her husband liquor; heard her husband call for a drink. She made no objection; said nothing to Miller at that time, although she had the opportunity." Defendant was the only witness in his behalf and testified, in substance, as follows: "He patronized my business more or less during the spring of 1903. To my knowledge I never saw him intoxicated during that time. I never sold him when he was intoxicated; don't know whether my bartender sold him or not. * * * When a man is intoxicated, in my judgment, he would be so he couldn't help himself. To be intoxicated would be unable to help himself, would lay in a stupor, and would not be able to go home. A man who is able to go home, though he reels and takes up the whole sidewalk, I should not judge to be intoxicated." Plaintiff's counsel presented no requests to charge. The jury returned a verdict in favor of plaintiff and against all of the defendants for the sum of $600. Plaintiff made a motion for a new trial on the ground that the verdict was against the law and the evidence and the damages awarded grossly inadequate. The motion was denied, reasons therefor filed, exception taken, and error assigned thereon. Plaintiff brings the record to this court for review upon writ of error.

In view of the verdict in plaintiff's favor against all of the defendants, the only assignments of error which require consideration are those based upon the denial of the motion for a new trial, and upon such rulings and instructions of the court as may have affected the amount of the damages. The seventh, eighth, and thirteenth assignments of error allege error in instructing the jury that the plaintiff could only complain of unlawful sales which were unlawful because made to an intoxicated person or one in the habit of getting intoxicated. "I do not mean by unlawful sales, sales made after hours at night or before lawful hours begin in the morning. We are not undertaking to punish

Mr. Miller because he kept open too late at night or opened up too early in the morning, or was open on Sunday or Christmas, or any other holiday. But you have a right to consider what sales he made and when he made them, if they were made to Mr. Merrinane, simply to enable you to understand in what way Mr. Miller was dealing with Mr. Merrinane; and, if he sold him liquors during the time he was a man in the habit of getting intoxicated or at times when he was intoxicated, he is liable, and it is sufficient whether he sold them out of hours or in hours. But, as I say, you may consider whether they were out of hours simply in connection with determining any wantonness, or recklessness or carelessness in the way he was dealing with Mr. Merrinane, and for no other purpose." This question arose during the progress of the trial, and plaintiff's counsel stated his position as follows: "If the sales the first year were legal at the time he was being made a drunkard, the bondsmen for that year are not liable. * * * If the sales are illegal and they tend to create the habit which makes him a drunkard, they are liable." It was held by this court in Peacock v. Oaks, 85 Mich. 578, that there could be no recovery under the statute for injuries caused by the sale or furnishing of liquor to another, unless such sale or furnishing is in violation of law. Whether this broad statement of the law may not require some qualification it is unnecessary to determine in this case. Plaintiff's counsel conceded that plaintiff could only complain of illegal sales, but contended that among such sales were included sales after hours or on Sundays, etc. We think the instruction properly limited the effect of such sales.

The ninth assignment of error complains of an instruction that plaintiff was not seeking to recover any part of the money that her husband spent for liquor. There is no specific claim for such an item of damages in the declaration, nor was any evidence given from which the jury could determine the amount of money spent for liquor by Merrinane.

The tenth assignment of error is as follows: "The court erred in charging the jury, as follows: 'But, if the amount she would receive had only been diminished and she had not been entirely deprived of it, then you would consider the extent of the diminution, if any, of her support due to those causes.'" It is contended that the testimony showed a complete and not a partial loss, and the instruction was therefore erroneous. The conten-

tion is not sustained by the record. There was only a partial loss during the first year at least.

The eleventh assignment of error is as follows: "The court erred in charging the jury as follows: 'Now, the expectancy tables have been shown here in evidence. Her age is 29 and his age 33. Her expectancy is 36 2-10 years and his expectancy 33 21-100. These are simply given to you as aids, not as absolute proof that he would live 33 years, or that she would live 36 years.'" The court correctly stated the general rule; and, if plaintiff's counsel claimed that the facts of this case took it out of the general rule, he should have brought such contention to the attention of the court. Davis v. M. C. R. R. (Mich.) 111 N. W. 76.

The serious question in the case is presented by the assignment of error upon the denial of the motion for a new trial. Are the damages so clearly inadequate, as claimed by plaintiff's counsel, that the trial judge ought to have awarded a new trial? The facts establishing plaintiff's cause of action, as presented by this record, are practically undisputed, and plaintiff would have been entitled, upon request therefor, to an instruction that she was entitled to a verdict, and the only question for the jury was as to the amount of the damages she had suffered. The undisputed facts presented by this record show that, when plaintiff and her husband moved to Grass Lake, he was a temperate, industrious man, of good standing in his vocation, earning $50 a month and contributing to his wife's support from $25 to $30 per month. A few months after coming to Grass Lake, he began drinking at defendant's saloon, and from that time on he gradually became intemperate until his discharge in December, 1903. "At the time of his discharge, he was there nearly all the time." After his discharge his descent was rapid until he became a common drunkard, and was no longer capable of furnishing any support to plaintiff. The defendant Miller and his employes began and completed Merrinane's ruin. So far as this record discloses, they had no helpers. As often as he requested, after legal hours, on Sundays, or legal holidays, regardless of the law and his wife, so long as he was able to stand before the bar, they dealt out the liquor to him, and only desisted when "he lay in a stupor, and would not be able to go home." "Miller sold him liquor while in that condition any time he wanted it if he could only stand up and drink. * * * Witness [the bar-

tender] told Miller if he kept selling Merrinane liquour it would make him trouble. Miller said he would not sell it to him, but the next day he would get it just the same. Miller said it was a good thing for witness's sister to get a divorce from Merrinane. Miller said that it was the way his sister's husband went. He either died or else she got a divorce. Miller said he thought Merrinane was so far gone he would never stop drinking." None of these statements were denied by Miller, and so clear a right to exemplary damages is presented by this record that a peremptory instruction to that effect would have been justified. The case is unique, in that the facts which support the cause of action are undisputed and no attempt is made to soften the harsh features of the case or mitigate the damages. On the contrary, we have the opinion of the principal defendant that the damage was complete; that "Merrinane was so far gone he would never stop drinking." Upon any reasonable theory of the facts disclosed by this record, we cannot regard the amount awarded plaintiff by the verdict of the jury as an adequate measure of her damages, and we think the trial judge erred in denying the motion for a new trial.

The judgment is reversed, and a new trial granted.

BECKERLE *v.* BRANDON.

Illinois, 1907. 229 Ill. 323.

This is an action on the case brought by John Brandon and Sarah Brandon, appellees, in the circuit court of Jackson county, under section 9 of the dramshop act (Hurd's Rev. St. 1904, c. 43), against George Beckerle, appellant, and one D. P. Willis, for injury to their means of support occasioned by the death of their son, John Brandon, Jr. A plea of the general issue was filed by defendants, and the trial resulted in a verdict and judgment for plaintiffs in the sum of $3,000. Defendants appeal. The declaration, which contains but one count, charges: That Beckerle conducted a dramshop in Murphysboro, Jackson county, Ill., in a certain building leased from one D. P. Willis; that Willis knew for what purpose the building was leased; that on September 1, 1905, while conducting said business, said Beckerle sold and gave intoxicating liquors to plaintiffs' minor son, causing his intoxication, and while so intoxicated, and in conse-

quence thereof, he was struck and killed by a certain railroad train; that during his lifetime their said son earned the sum of $70 per month; that they were entitled to his wages; that he contributed the same to their maintenance and support; and that by reason of his death they have been injured in their means of support and deprived of the same. It appears from the record that on August 31, 1905, Beckerle kept a saloon in the city of Murphysboro in a building leased from D. P. Willis, who was the owner thereof. The deceased, who was a minor son of the plaintiffs, 17 years of age and residing with them, was employed as a mule driver in a coal mine, earning the sum of $2.42 a day. It seems from the evidence that all of the money earned by the son was by him paid over to his parents and used by them in support of the family. In the early part of the evening of August 31, 1905, John Brandon, Jr., with several other boys, went to the saloon of defendant Beckerle, where they remained until midnight, drinking intoxicating liquors and playing cards. The saloon closed at midnight, and by that time Brandon was very much intoxicated. Liquor had been sold and served to him in the saloon on that evening by both Beckerle and his barkeeper. He was perfectly sober when he entered Beckerle's saloon and had obtained liquor from no other place during the night. As the saloon closed, one of Brandon's associates obtained a pint of whisky from the barkeeper, and, with this companion and another, Brandon started for Mt. Carbon, where all three resided, on the opposite side of the Big Muddy river from Murphysboro. To reach their homes they started to cross the stream on the Illinois Central Railroad bridge, which spans the river at that place. When about halfway across they stopped, and each took a drink of whisky. They then sat down on the bridge, and in a few minutes fell asleep. Between two and three hours afterward, deceased, while still asleep on the bridge, was struck by a passing train and received injuries from which he died the following afternoon. It is urged by appellants as grounds for reversal: First, the court erred in passing on instructions; second, the court erred in passing on objections to evidence.

SCOTT, J. (after stating the facts as above). There is evidence in the record which shows that the deceased was but 17 years of age; that on the night of his death Beckerle, by himself or his barkeeper, sold intoxicating liquor to the boy which caused his

intoxication, and also sold him liquor of that nature after he was so intoxicated; that the appellees were injured in their means of support in consequence of such intoxication; and that Willis rented the premises to Beckerle and knowingly permitted the sale of intoxicating liquors therein.

The court gave plaintiffs' instruction No. 8, which advised the jury that if they found for the plaintiffs, and found certain alleged facts to be true, they might then return a verdict including exemplary damages. This is said to have been wrong so far as Willis, the owner of the property, is concerned, as the evidence did not show any intentional wrongdoing, or any reckless, malicious, wanton, or oppressive conduct on his part. Section 9 of chapter 43, Hurd's Rev. St. 1905, gives a right of action against the liquor seller under certain circumstances, and provides that the owner of the building, in specified contingencies, "shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages." The language just quoted received the consideration of this court in Hackett v. Smelsley, 77 Ill. 109, and the reasoning of that opinion warranted the circuit court in giving the instruction above referred to.

It is then urged that the court erred in not permitting the defendants to show that the father and son visited and drank together at other saloons at other times. Inasmuch as the plaintiffs were claiming vindictive damages, this evidence was competent. Hackett v. Smelsley, *supra*. The fact that the wife sued jointly with the husband did not warrant its exclusion. If the father had on other occasions consented to the sale of intoxicating liquor to his minor son, the jury had a right to take that fact into consideration in determining whether vindictive damages should be awarded, and in fixing the amount thereof in case they awarded damages of that kind, no matter who sued. We think, however, that this error does not warrant a reversal. It was shown by the testimony of the father and others that on earlier occasions at Beckerle's bar the son had bought intoxicants, the father consenting, and that the son had there, in the presence of the father, partaken of the same without objection from the

latter. Under these circumstances the exclusion of the evidence in question was not harmful.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

The Civil Damage Act in Illinois declares that for wrongful death through intoxication caused by drinking at defendant's saloon "the jury may give such damages as they shall deem a fair and just compensation." Where deceased was a confirmed inebriate, whose wife had obtained a divorce, and whose next of kin was an adult self-supporting brother, it was held, in North Chicago St. Railway Co. v. Biddie, 40 N. E. Rep. 942, that only nominal damages could be recovered.

A saloon-keeper is liable under the civil damage law, when it is shown that his agent sold liquor to a man, who, when intoxicated, committed suicide, when said saloon-keeper had been notified by decedent's wife not to sell liquor to her husband. Dice v. Sherberneau, 152 Mich. 601. See also Hilliker v. Farr, 149 Mich. 444.

X. EMINENT DOMAIN.

SOUTH BUFFALO RAILWAY CO. *v.* KIRKOVER.

New York, 1903. 176 N. Y. 301.

BARTLETT, J. The single question of law presented by this appeal is as to the rule which should govern the commissioners in awarding compensation for damages to the part of the tract of land not taken. The counsel for the appellant railroad company insists that the proper rule as to damages, in addition to those allowed for the land actually taken, may be thus stated: "Compensation is only allowed for such damages to the residue as are caused by the severance from it of the part taken, and (according to some of the cases) in estimating such damages the grade or elevation of the railroad may be taken into account as an element of the severance." The learned Appellate Division in its opinion (83 N. Y. Supp. 613) states the rule to be that the owner is entitled to recover the market value of the premises actually taken by such railroad company, and also any damages which resulted to the portion of his premises not taken, not only by reason of the taking of the property acquired by the railroad company, but also by reason of the use to which the property was put by the company. It has been frequently pointed out in judicial opinions that there has been great conflict of authority in this state as to which of the rules above stated was best calculated to do justice between the parties. The early cases in the Supreme Court laid down the rule insisted upon by appellant's counsel. Troy & Boston R. R. Co. v. Lee, 13 Barb. 169; Albany Northern R. R. Co. v. Lansing, 16 Barb. 69; Canandaigua & N. F. R. R. Co. v. Payne, *Id.* 273; Matter of Union Village & Johnsonville R. R. Co., 53 Barb. 457; Black River & M. R. R. Co. v. Barnard, 9 Hun, 104; Albany & Susquehanna R. Co. v. Dayton, 10 Abb. Prac. (N. S.) 183. In Matter of Utica, C. & S. Valley R. R. Co., 56 Barb. 456, the General Term held that. when land is taken for the construction of a railroad without the consent of an owner, compensation to be paid therefor is not limited to the actual value of the land taken and the de-

preciation of the residue of the lot from which it is taken by such separation; but the owner is entitled to recover also for any depreciation caused by the use to which it is appropriated. This case was followed in Matter of N. Y. C. & H. R. R. R. Co., 15 Hun, 63, and Matter of N. Y., Lackawanna & Western Ry. Co., 29 Hun, 1. The tendency of judicial decisions in the Supreme Court has been in favor of the more liberal rule adopted by the court below in the case at bar.

Our attention has not been called to any case in this court where the question was presented under the precise state of facts disclosed by this record. In Henderson v. N. Y. C. R. R. Co., 78 N. Y. 423, it was held that in a proceeding by a railroad corporation to acquire a right to lay its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is: First. The full value of the land taken. Second. The fair and adequate compensation for the injury the owner has sustained and will sustain by the making of the railroad over his land; and for this purpose it is proper to ascertain and determine the effect the conversion of the street into a railroad track will have upon the residue of the owner's land. In Newman v. Metropolitan Elevated Ry. Co., 118 N. Y. 618, Judge Brown (page 623, 118 N. Y., and page 902, 23 N. E.) uses this language: "The principle upon which compensation is to be made to the owner of land taken by proceedings under the general railroad law has been frequently considered by the courts of this state, and the rule is now established, first, that such owner is to receive the full value of the land taken; and, second, where a part only of land is taken, a fair and adequate compensation for the injury to the residue sustained, or to be sustained, by the construction and operation of a railroad." The case in which the learned judge wrote was one of that large class of elevated railway cases in the city of New York involving injury to the easements of light, air, and access, no land being taken. In Bohm v. Metropolitan Elevated Ry. Co., 129 N. Y. 576, Judge Peckham uses this language: "Then, as to the land remaining, the question has been to some extent mooted whether the company should pay for the injury caused to such land by the mere taking of the property, or whether, in case the proposed use of the property taken should depreciate the value of that which was not taken, such proposed use could be regarded, and the depreciation arising therefrom be awarded as a part of

the consequential damages suffered from the taking. I think the latter is the true rule." The learned judge cites Henderson v. N. Y. C. R. R. Co., 78 N. Y. 423, 433; Newman v. Metr. El. Ry. Co., 118 N. Y. 618; Matter of Brooklyn Elevated R. R. Co., 55 Hun, 165, 167, adding: "The question might be of great importance where there was an injury to the remaining land; but, if there has been no injury, the inquiry as to the scope of the liability for damages is not material." This was also an elevated railroad case, involving only the injury to easements, and no land was taken. It may be true, as stated by appellant's counsel, that the precise question now presented has never been passed upon by this court. It is, however, equally true that the decisions in the Supreme Court and in this court tend strongly to the recognition of the more liberal rule.

Considering the principle involved, unembarrassed by legal decisions, it is reasonable that where the state, in the exercise of the right of eminent domain, sees fit to take the property of the citizen without his consent, paying therefor such damages as are the result of the taking, the commissioners in the condemnation proceedings should not only be permitted, but required, to award the owner a sum that will fully indemnify him as to those proximate and consequential damages flowing from this act of sovereign power. The exercise of the right of eminent domain is allowed upon the theory that, while the taking of property may greatly inconvenience the individual owners affected, it is in the interest and to promote the welfare of the general public. This being so, there is no reason why the citizen whose land is taken *in invitum* should suffer any financial loss that may be prevented by awarding him proximate and consequential damages. It may well be that in every case there are remote damages that the citizen, under the circumstances, must suffer. It not infrequently happens that some extensive public improvement, as the construction of a great reservoir in the vicinity of a large city like New York, drives families from old homesteads occupied for generations, and submerges the entire property. It it apparent that in such cases no reasonable and lawful rule of damages can fully compensate the landowners thus dispossessed. In the case at bar we have the ordinary and usual situation, where the commissioners have reported in favor of paying the owner the value of the land taken, and the damage to the balance by reason of the severance, and the use to which the prop-

erty taken is to be put by the railroad company. It is insisted on behalf of the appellant that the commissioners erroneously took into account as factors causing damage the use to which the property was to be put; that is, the operation thereon of a railroad, with its smoke, noise, dust and cinders, and the embankment obstructions to the view. It is also argued that the elevated railroad cases in the city of New York are in a special category, and not applicable to the case at bar. In most of the elevated railroad cases the city owned the fee of the street, the railroad being erected therein by legislative grant, and the original question presented to this court was whether the injury suffered by the abutting owner to his easements of light, air, and access created a cause of action against the railroad company. It was held in the Story Case, 90 N. Y. 122, that these easements became at once appurtenant to the land, forming an integral part of the estate, and constituted property within the meaning of the state Constitution (article 1, § 6), which prohibits the taking of private property without just compensation. It therefore followed that in the trial of the elevated railroad cases any evidence was competent tending to show injury to these easements of light, air, and access, as they were property. A similar rule of evidence is applicable to the case before us. The difference between the elevated railroad cases and this case is not material. In this case, as in the elevated railroad cases, one of the questions is as to the damages inflicted upon land not taken, and the inquiry is, to what extent does the use of the railroad on the adjacent property taken damage the property the fee of which remains in the defendants? This property is the land and its appurtenances. Any evidence tending to legally establish the amount of this damage is competent.

It is to be assumed that the commissioners appointed from time to time in condemnation proceedings are intelligent and competent men, anxious to do exact justice between the parties. It may be further assumed that they will judiciously discriminate between farm lands in the country and property located within the limits of a city, upon which dwellings and other structures may be ultimately erected. In the one case, under existing conditions, damages might be slight, while in the other very substantial. In this case it is pointed out in the opinion of the learned Appellate Division that the average amount of damages to the property not taken was $94,435, as fixed by nine wit-

nesses called by the defendants, but the commissioners found the damages to be $41,500. Attention is also called to the fact in the opinion that the average amount of damages fixed by plaintiff's witnesses was much less than the award. It appears by the report of the commissioners that on a number of days, by consent of counsel, they personally inspected the premises involved in this proceeding. We are of opinion that the rule of damages adopted by the commissioners was the proper one, and that the record discloses no legal error.

The order and judgment appealed from should be affirmed, with costs.

PARKER, C. J., and O'BRIEN, MARTIN, VANN, CULLEN, and WERNER, JJ. concur.

Order affirmed, with costs.

STEPHENS *v.* NEW YORK, O. & W. RY. CO.

New York, 1903. 175 N. Y. 72.

The action was commenced in 1889 to restrain the operation of the defendant's road upon tracks opposite the plaintiff's premises on Second street, in the village of Fulton, until his interests were acquired through condemnation proceedings, and to recover the damages sustained by him in the past. The principal defense to the action was based upon a resolution of the trustees of the village permitting the defendant's predecessor, the New York & Oswego Midland Railroad Company, to lay the track of its railroad in the street, and upon an instrument in writing, and under seal, executed by the plaintiff and other abutting landowners, giving their consent to the operation of the railroad upon the street in front of their lots. The trial was had before a referee, who, upon findings, rendered a decision in favor of the defendant, and dismissed the complaint. Upon appeal the Appellate Division in the Fourth Department affirmed the judgment entered upon the referee's decision, and the plaintiff appealed to this court.

The referee held that the instrument signed by the plaintiff was a license, and that its effect was to abandon what easements the plaintiff had in the street, and to preclude him from recovering any damages consequent upon the construction and operation of the railroad.

GRAY, J. Whether we hold the instrument in question, to which the plaintiff affixed his seal and signature, to be a license or an agreement for an easement, is not very material to the decision, in my opinion, for the reason that in either holding it was quite inadequate to confer a right to make use of the street for railroad operations to an unlimited extent.

I reach the conclusion that, the location or route of the proposed railway being indefinitely described upon the map and by the plaintiff's agreement, the principle of construction which obtains in the cases of grants of easements made in general terms should govern here, and, applying it to the established facts, the court should hold that the track, as located in the center of Second street, was unchangeable, and that the railway could not be added to upon the plaintiff's land without his further permission, or the acquisition of the right through statutory condemnation proceedings. Washburn on Easements, 225, 240; Onthank v. Lake Shore & M. S. R. R. Co., *supra;* Jennison v. Walker, 11 Gray, 423. When the railroad company undertook to change and to add to its tracks in the ways described, it became a trespasser as to the plaintiff. It rendered itself liable to be restrained in its operations, and to a recovery of damages for any injuries sustained. So far as the ordinary and necessary operation of its railroad upon the one track through the street would cause annoyance, or constitute a nuisance, affecting the enjoyment and use of his property, the plaintiff could not complain. No recovery of consequential damages could be had which were occasioned by the injuries resulting therefrom. They would be the incidents of the right granted, as to which the defendant would be released. But, so far as it was a trespasser upon plaintiff's land, the defendant could be compelled to acquire further easements therein, if needed for its corporate purposes, by purchase or through condemnation proceedings, under the penalty of being restrained in its operations if it failed to do so; and, so far as damages had been sustained through defendant's wrongful acts, to the extent that they may be separately established as resulting therefrom, they can be recovered by the plaintiff. That any appreciable damage resulted from the slight change in the location of the passenger and freight depots is not apparent upon the proofs. They were necessary incidents to the operation of the railroad as authorized.

For these reasons, I advise a reversal of the judgment, and that a new trial should be ordered, with costs to abide the event.

PARKER, C. J., and MARTIN, CULLEN, and WERNER, JJ. concur. BARTLETT, J., concurs in result. HAIGHT, J., absent.

Judgment reversed, etc.

HENKEL v. WABASH, P. T. R. CO.

Pennsylvania, 1906. 213 Pa. 485.

FELL, J. This action was to recover the value of land taken by the defendant company under the right of eminent domain for the purpose of building a station. The specifications of error all relate to the admission of testimony offered by the defendant. The main ground of the appellant's complaint is that the defendant was allowed to prove the circumstances attending the sale of two properties in the immediate vicinity. The plaintiff's counsel had called the attention of witnesses on both sides to these sales, his own in their examination in chief, and on the cross-examination of the defendant's witnesses he had shown the prices paid. On the cross-examination of the plaintiff's witnesses it appeared that one of them had based his opinion of the value of the plaintiff's property entirely on one of these sales, and that another witness had based his opinion mainly, if not exclusively, on the two sales. The prices paid for these properties thus became a standard of value of property in the vicinity. The defendant's offer was not to show the prices paid for these two properties, but to prove by the purchasers that the sales were made under special circumstances, and that the prices were greatly in excess of the market values and were not a criterion thereof.

It has been long established that the proper test of the value of land taken under the right of eminent domain is its market value, and that this value is not to be ascertained by proof of particular sales, but by the general selling price of land similarly situated. While particular sales may not be proved as establishing a market value, the good faith of a witness and the accuracy and extent of his knowledge may be tested by questioning him as to particular sales, to ascertain whether he knew of and considered them in forming an opinion. These inquiries go directly to

the value of the opinion expressed. We see no reason why a party against whose interest a witness has testified may not show that the opinion expressed is valueless as evidence, because it is founded on a misapprehension of the facts, as that a supposed sale has never been made, or that the consideration named was fictitious, or that the sale had been without regard to the market value. This does not lead, as would the proof of particular sales, to the trial of collateral issues. It goes only to impair the value of an opinion which has become evidence in the case by showing that it is based on a misapprehension of the real facts.

The assignments of error are overruled, and the judgment is affirmed.

IN RE CITY OF NEW YORK.

New York, 1907. 107 N. Y. Supp. 567.

BISCHOFF, J. The award for parcels Nos. 1 and 2 in this proceeding involves an inconsistency which requires that the report be sent back to the commissioners for further consideration. These parcels comprised the larger part of the block bounded by Fifteenth and Sixteenth streets, Tenth avenue, and the North river; and the whole block was in single ownership of the estate of Bradish Johnson, a corporation, and leased to the Central Railroad of New Jersey for the purposes of a freightyard, at a net annual rent of $55,000 under a lease, made in the year 1892, to endure for 21 years. The commisioners have awarded to the owner for the land and bulkhead rights taken the sum of $752,000, and to the tenant $48,000, and have apportioned the rent of the land not taken in the sum of $12,000 per annum.

The gross award for all interests in these parcels is thus $800,000; and, if the lease was a fair measure of the value of the land, the apportionment of rent discloses that the tenant had agreed to pay $43,000 a year net for the land taken. Thus a value of over $1,000,000 is indicated, at the ordinary investment rate, which measures the value of the land under a lease of this character, and the award of $800,000 would appear, upon this basis, to be quite inadequate. There was expert evidence, however, that the rent reserved in the lease was too high; and, while this proof was not of a very satisfactory character, it may be

that it could suffice for acceptance by the commissioners without disapproval by the court, in view of the court's limited power to review the evidence in these proceedings, but if, upon this theory, the award to the owner may be deemed adequate, the tenant must necessarily have made a very bad bargain and was benefited by being relieved of the grater part of its burden. But the tenant has been awarded $48,000; and since an allowance for fixtures could not, upon the evidence, have well exceeded $20,000, it is clear that a large sum has been allowed for the loss of the lease. It is impossible to say that the tenant was damaged if the rent reserved was too high for this class of property; and if it was not too high, the owner's award is inadequate by some $200,000, an amount which, in no possible aspect of the proof, could be applied as an offset for benefit to the remaining property.

The award to the Consolidated Gas Company, the owner of adjacent property, is to some degree involved, since, while the character of the parcels is not the same, in the uses to which they may be put, the value of one parcel bears upon the value of the other because of their similarity of situation, and therefore the awards as to all parcels should be reconsidered.

Certain objections which have been presented, may properly be passed upon at the present time, notwithstanding that the report, as it stands, cannot be confirmed. The contention that benefits should be eliminated in the fixing of awards is met by the recent decision of the Appellate Division in Matter of North River between West Eighteenth and West Twenty-Third streets, 118 App. Div. 865, 105 N. Y. Supp. 750, and the benefits accruing from the improvement were thus properly considered by the commissioners.

The Consolidated Gas Company objects to the disallowance of compensation for damages suffered by it through the lessened value of its equipment in the streets of the city by reason of the taking of its gas tanks in this proceeding, the property referred to being in the form of gas mains laid in the city streets and fed by these tanks. If these mains were laid in the streets under a license from the city merely, the claimant necessarily would be at the risk of being required to remove the property or to change its position when public convenience demanded it (Matter of Deering, 93 N. Y. 361), and the bringing of this proceeding would serve in effect as the revocation of a license by

the city, so far as it was revocable (Kingsland v. Mayor, 110 N. Y. 569, 18 N. E. 435); but it is claimed that the right to lay these mains in the streets existed by virtue of the claimant's charter, and that the city was not in a position to interfere with the rights so acquired. This contention I take to be untenable. The origin of the claim to a right to lay gas mains in the streets, so far as a right is deemed to have accrued to this claimant, is a certain franchise granted to the Municipal Gas Light Company by the city on March 22, 1877. The Municipal Gas Light Company was one of the constituent companies of the claimant corporation, but the franchise referred to contained the following provision:

"Neither said permission nor any right conferred on said company by said resolution shall be assigned or transferred without the previous consent of the common council."

Upon the consolidation which took place and which resulted in the formation of the claimant, the Consolidated Gas Company, under chapter 367, p. 448, Laws 1884, such rights as were possessed by the constituent companies passed to the corporation thus formed, but no greater rights were acquired than were originally possessed; and, failing the consent of the common council, there appears to have been no warrant in law for this claimant's maintenance of the gas mains in these streets. In this view, the claimant took no rights in the matter which could survive the city's determination to revoke the permission deemed to have been granted to the Municipal Gas Light Company to lay the mains, and there was no damage which could be made the subject of compensation in this proceeding because of the diminution in the value of the property thus placed in the streets. Again, it would appear that the commissioners had no authority to award damages for property not embraced within the area of the improvement. The matter is regulated by section 822 of the charter, which limits the award of damages to compensation for the property taken, and does not appear to include, by inference, consequential injury to the business of the owner elsewhere in the city by reason of the taking of the land.

The objection that the commissioners failed to make an allowance for "plottage"—a supposed enhancement of value by reason of the fact that the parcels, of which this claimant was the owner, were in a single ownership—is met in the finding of the commissioners that as a matter of fact in these instances no

such added value did exist. The question whether or not "plottage" is an element of value depends necessarily upon the evidence of the particular circumstances surrounding the use of the property and its situation, and there is no rule of law that "plottage," taken alone, must have a value in every case.

It is also objected by both claimants that the commissioners refused to state what additional value was given to the land because of the fact that the land and the bulkhead rights belonged, in each instance, to the same claimant. The report contains the statement that the commissioners have taken into consideration and account the fact that the ownership of the bulkhead and bulkhead rights and the lands immediately adjacent were in the same owners, and have found that this fact increases the value of the land taken, and have included such increase in value in their awards. This statement appears to be all that can properly be required within the ruling of Board of Water Commissioners v. Shutts, 25 App. Div. 22.

For the reasons stated, the motion to confirm the report is denied, and the report will be sent back to the commissioners for further consideration of the awards made.

Motion denied and report sent back.

In proceedings to condemn land for cemetery purposes, the court may consider any use to which the property may be profitably appropriated; yet it is not necessary to presume that the land would ever be put to any other use than that to which it is at present devoted. Phillips v. Town of Scales Mound, 195 Ill. 353.

The measure of damages for land taken by a railroad is the difference in the market value of the tract, as a whole, before taking and afterwards. Profits of business cannot be recovered in condemnation proceedings, particularly speculative profits, such as profits from raising 50,000 ducks per year on a farm. Cox. v. Phila. H. & P. Co., 215 Pa. 506.

Where a quarry is condemned under eminent domain, the proper measure of damages is the actual value of the stone in place, and not the value of that stone when cut and sold in the market. Cole v. Ellwood Power Co., 216 Pa. 203.

See as to rule of damages, where the entire use of a house is taken, Hutchins v. Munn, 209 U. S. 246.

Diversion of traffic is not an element of compensation in condemnation proceedings. Chicago v. Lonergan, 196 Ill. 518.

Increased danger from fire and increased danger to live stock can be considered. Chicago S. Ry. Co. v. Nolin, 221 Ill. 373.

Substantial damages may be awarded for interference with an easement of an adjoining owner by smoke, ashes, vibration, dust, dirt and

drippings, caused by the operation of a railroad. L. I. R. R. Co. v. Garvey, 159 N. Y. 334. See, too, Monday Mfg. Co. v. Penn. R. R. 215 Pa. 110.

An award to the owner, made after the construction of a reservoir should include the value of the construction and work placed upon the land. The true inquiry is: How much do the improvements enhance the value of the owner's land? Village of Johnsville v. Smith, 184 N. Y. 341.

XI. VALUE.

KOUNTZ *v.* KIRKPATRICK.

Pennsylvania, 1872. 72 Pa. 376.

Action of assumpsit brought August 30, 1870, by Joseph Kirkpatrick and James Lyons, trading as Kirkpatrick & Lyons, to the use of Frederick Fisher & others, trading as Fisher Brothers, against William J. Kountz, for refusal to deliver 2,000 barrels of crude petroleum under a written contract of sale made on the 7th day of June, 1869.

The verdict was for plaintiffs for $3,753; the defendant took out a writ of error.

AGNEW, J. * * *

The act of Kirkpatrick & Lyons, complained of as members of an unlawful combination to raise the price of oil, was long subsequent to their assignment of Kountz's contract, and was a mere tort. The contract was affected only by its results as an independent act. It does not seem just, therefore, to visit this effect upon Fisher & Brothers, the antecedent assignees. The act is wholly collateral to the ownership of the chose itself, and there is nothing to link it to the chose, so as to bind the assignors and assignees together. After the assignment, there being no guaranty, the assignors had no interest in the performance of this particular contract, and no motive, therefore, arising out of it to raise the price on Kountz. The acts of Kirkpatrick & Lyons seem, therefore, to have no greater or other bearing on this contract than the acts of any other members of the combination, who were strangers to the contract.

In regard to notice of the assignment to Kountz, it is argued, that having had no notice of it, if he knew of the conspiracy to raise the price of oil, and thus to affect his contract, and that Kirkpatrick & Lyons were parties to it, he might have relied on that fact as a defense, and refused to deliver the oil, and claimed on the trial a verdict for merely nominal damages for his breach of his contract. Possibly in such a special case, want of notice might have constituted an equity, but the answer

to this case is, that no such point was made in the court below, and there does not seem to be any evidence that Kountz knew of the conspiracy, and Kirkpatrick & Lyons's privity, and relying on these facts, desisted from purchasing oil to fulfil his contract with them. As the case stood before the court below, we discover no error in the answers of the learned judge on this part of it.

The next question is upon the proper measure of damages. In the sale of chattels, the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well established rule, but as this case raises a novel and extraordinary question between the true market value of the article, and a stimulated market price, created by artificial and fraudulent practices, it is necessary to fix the true meaning of the rule itself, before we can approach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of value is worth, and this worth is made up of the useful or estimable qualities of the thing. See Webster's and Worcester's Dictionaries.

Price, on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it: *Id. Ibid.* Value and price are, therefore, not synonyms, or the necessary equivalents of each other, though commonly, market value and market price are legal equivalents. When we examine the authorities, we find also that the most accurate writers use the phrase market value, not market price. Mr. Sedgwick, in his standard work on the measure of damages, 4th ed, p. 260, says: "Where contracts for the value of chattels are broken by the vendor's failing to deliver property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered upon the ground; that this is the plaintiff's real loss, and that with this sum, he can go into the market and

supply himself with the same article from another vendor." Judge Rogers uses the same term in Smethurst v. Woolston, 5 W. & S. 109: "The value of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor for a breach of the contract." So said C. J. Tilghman, in Girard v. Taggart, 5 S. & R. 32. Judge Sergeant, also, in O'Conner v. Forster, 10 Watts, 422, and in Mott v. Danforth, 6 *id.* 308. But as even accurate writers do not always use words in a precise sense, it would be unsatisfactory to rely on the common use of a word only, in making a nice distinction between terms. It is therefore proper to inquire into the true legal idea of damages in order to determine the proper definition of the term value. Except in those cases where oppression, fraud, malice or negligence enter into the question, "the declared object (says Mr. Sedgwick, in his work on Damages) is to give compensation to the party injured for the actual loss sustained," 4th ed., pp. 28, 29; also, pp. 36, 37. Among the many authorities he gives, he quotes the language of C. J. Shippen, in Bussy v. Donaldson, 4 Dallas, 206. "As to the assessment of damages (said he), it is a rational and legal principle, that the compensation should be equivalent to the injury." "The rule," said C. J. Gibson, "is to give actual compensation, by graduating the amount of the damages exactly to the extent of the loss." "The measure is the actual, not the speculative loss:" Forsyth v. Palmer, 2 Harris, 97. Thus, compensation being the true purpose of the law, it is obvious that the means employed, in other words, the evidence to ascertain compensation, must be such as truly reaches this end.

It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz., compensation, in all those cases where the market evidently does not afford the true measure of value. This thought is well expressed by Lewis, C. J., in Bank of Montgomery v. Reese, 2 Casey, 146. "The paramount rule in assessing damages (he says), is that

every person unjustly deprived of his rights, should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invarible standard, and that the converse of the case then before Judge Lewis is equally true—that is to say—when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept: Andrews v. Hoover, 8 Watts, 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory means, it does not follow that it is, nor was it said in Girard v. Taggart, to be the only one. On the contrary, the propriety of the direction there, that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in Trout v. Kennedy, 11 Wright, 393. That was the case of a trespasser, and the jury had been told that the plaintiff was entitled to the just and full value of the

property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price—neither is the true and only measure of value.

These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own state, bearing strongly on this point: Blyenburgh et al. v. Welsh et al., Baldwin's Rep. 331. Judge Baldwin had charged the jury in these words: "If you are satisfied from the evidence, that there was on that day a fixed price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge Hopkinson said: "It is the price—the market price—of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the value, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to

be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The case of suspended sales upon a rumor tending to enhance the price, put by Judge Hopkinson, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for nonfulfillment of their bargains. In the same case, Judge Hopkinson further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to take as that price whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining," says an eminent writer on contracts, "what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value is peculiarly one for a jury:" Parsons on Contracts, vol. 2, p. 482, ed. 1857. In Smith v. Griffith, 3 Hill, 337-8, C. J. Nelson said: "I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations, for temporary, special and selfish objects, independent of the objects of lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be re-

garded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice." I may close these sayings of eminent jurists with the language of Chief Justice Gibson, upon stock-jobbing contracts; Wilson v. Davis, 5 W. & S. 523: "To have stipulated," says he, "for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called cornering; in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in which parties deal upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil per gallon, on the 31st of December, 1869, as demanded by the defendant in his fifteenth point. There was evidence from which the jury might have adduced the following facts, viz.: That in the month of October, 1869, a number of persons of large capital, and among them Kirkpatrick & Lyons, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit; that they bought oil largely, and determined to hold it from the market until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December, 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number says: It was our purpose to take the oil, pay for it, and keep it until January 1st, 1870, otherwise we would have been heading the market on ourselves. Mr. Long says that on the 3d of January, 1870, he sold oil to Fisher & Brother (the plaintiffs) at thirteen cents a gallon, and could find no other

purchaser at that price. Several witnesses, dealers in oil, testified that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December, 1869, than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st of January, 1870, except that the so-called combination ceased to buy at the last of December, 1869.

It was, therefore, a fair question for the jury to determine whether the price which was demanded for oil on the last day of December, 1869, was not a fictitious, unnatural, inflated and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December, 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. It cannot be possible that a "corner," such as took place a few weeks since in the market for the stock of a western railroad company, where shares, worth in the ordinary market about sixty dollars each, were by the secret operations of two or three large capitalists, forced up in a few days to a price over two hundred dollars a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation. Our views upon the effect of the affidavit of defense, on which the learned judge in a great measure ruled the question of damages, will be expressed in the case of Kountz v. The Citizens' Oil Refining Co., in an opinion to be read immediately.

Judgment reversed, and a *venire facias de novo* awarded.

SHARSWOOD and WILLIAMS, JJ., dissented on the question of the measure of damages.

BOOM CO., *v.* PATTERSON.

United States Supreme Court, 1878. 98 U. S. 403.

FIELD, J. The plaintiff in error is a corporation created under the laws of Minnesota to construct booms betweens certain designated points on the Mississippi and Rum Rivers in that state. * * * The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi River above the Falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the District Court to appraise its value. They awarded to the owner the sum of $3,000. The company and the owner both appealed from this award. * * *

Upon the question litigated in the court below, the compensation which the owner of the land condemned was entitled to receive and the principle upon which the compensation should be estimated, there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because

the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons except the plaintiff in error were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. * * *

The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands condemned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a con-

demnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, In the Matter of Furman Street, (17 Wend. 669,) where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In Goodwin v. Cincinnati & Whitewater Canal Co. (18 Ohio St. 169), where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in Young v. Harrison, (17 Ga. 30,) where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner. * * *

Judgment affirmed.

HILTON *v.* PHOENIX ASSURANCE CO.

Maine, 1898. 92 Me. 272.

SAVAGE, J. Action on policy of fire insurance dated September 4, 1889. The case comes to us on report. It is conceded that the policy was issued and the premium paid, and that the property was destroyed by fire September 1, 1892, within the life of the policy. The policy covered two sets of buildings and other prop-

erty. The property burned with the insurance upon it is described in the policy as follows: "$800 on frame dwelling house and L; $700 on frame barn situate about 100 feet from said dwelling, and $200 on hay therein,—situate in school district No. 6, Wells, Me., and also occupied by insured." In a previous part of the policy, another dwelling house, also insured, was described as "occupied by assured as a residence." * * *

It remains for us to estimate the amount of the plaintiff's loss. This is a question which should have been submitted to a jury. The evidence necessarily consists of the opinions of witnesses. Very much depends upon their intelligence and credibility, and glean as well as we may from the cold printed page, we cannot be sure that we are able to distinguish those to whom most credit should be given. A jury, seeing and hearing them, could judge better than we. The witnesses estimate the loss all the way from $1,700 for the house, and $1,100 for the barn (which is the same as claimed by the plaintiff in his proof of loss), to $600 for both buildings. The higher estimates are clearly made on a wrong basis,—what it would cost to replace the burned buildings with new ones. The policy is a contract of indemnity merely. Donnell v. Donnell, 86 Me. 518. The plaintiff is entitled only to have his actual loss made good. The true measure of damages is the value of the buildings themselves as they stood upon the land just before the fire. 2 Sedg. Meas. Dam. § 722. These buildings, though apparently in a fair state of repair, were old,—some of them very old. They were no longer in use, but we cannot assume that they were useless. Upon the whole, it is the opinion of the court that the plaintiff should be allowed to recover $800 for the loss of his buildings. He also lost five tons of hay, for which he should be allowed $60. The policy provides that payment shall be made within 60 days after due notice and proof of loss shall have been made by the assured. We think the plaintiff should recover interest after 60 days from the time he corrected his proof of loss, which was June 12, 1893.

Judgment for plaintiff for $860, and interest from August 11, 1893.

McMAHON *v.* CITY OF DUBUQUE.

Supreme Court of Iowa. 1898. 107 Iowa, 62.

Action for damages occasioned by a fire set out from sparks escaping from the smokestack of a steam road roller owned and being operated by the city of Dubuque in rolling newly laid macadam on one of its streets on which the lots of plaintiff abutted. The house thereon, with its contents, was destroyed. The jury returned a verdict for the plaintiff on which judgment was rendered, and the defendant appeals.

LADD, J. The household goods and wearing apparel of the plaintiff and his family were destroyed. These had been used, were worn, and somewhat out of style. Such property has no recognized market value, and recovery must be based on its actual value. Gere v. Insurance Co., 67 Iowa, 272, Clements v. Railway Co., 74 Iowa, 442. To ascertain the actual value, it was proper to take into consideration the original cost of the articles, the extent of their use, whether worn or out of date, their condition at the time, and from all these determine what they were fairly worth. The cost alone would not be the correct criterion for the present value, but it would be difficult to estimate the value of such goods except by reference to the former price, in connection with wear, depreciation, change in style, and present condition. Luse v. Jones, 39 N. J. Law, 707; Railway Co. v. Nicholson, 61 Tex. 550, Lumber Co. v. Wilmore, 15 Col. Sup. 136; Printz v. People, 42 Mich 144. * * * Evidence was received, over the defendant's objection, showing the actual value of the house at the time of the fire, and, it is said, this does not furnish the true basis of recovery. The fundamental principle in all actions for damages is that just compensation be made to him who has suffered injury from another in his person or property, and, in order to give satisfaction, measured in money, such rules are formulated as are thought best adapted to accomplish this purpose. A distinction has, for this reason, been made between growing crops, shrubs, and trees, whose chief value is because of their connection with the soil and their incidental enhancement of the value of the land, and those improvements which may be replaced at will, and whose value may readily be determined, apart from the ground on which they rest. It is thus put by Mr. Sutherland in his work on Damages (volume 3, p. 368): "If the thing destroyed, although it is a part of the realty,

has a value which can be accurately measured and ascertained without reference to the soil on which it stands, or out of which it grows, the recovery may be the value of the thing thus destroyed, and not for the difference in value of the land before and after such destruction." In Drake v. Railway Co., 63 Iowa, 310, crops were destroyed by overflow caused by an embankment, and the measure was held to be the difference between the market value of the land immediately before and after the injury. This rule was approved in Sullens v. Railway Co., 74 Iowa, 660, and applied, where growing trees were burned, in Greenfield v. Railway Co., 83 Iowa, 276, and Brooks v. Railway Co., 73 Iowa, 182. See Smith v. Railroad Co., 38 Iowa, 518; Striegel v. Moore, 55 Iowa, 88. In Rowe v. Railway Co., 102 Iowa, 288, the court said: "Appellant's contention results in fixing the value of each tree destroyed or damaged by the fire, and the aggregate of such values would be the measure of plaintiff's recovery. Such a rule may well be held applicable to the destruction by fire of buildings, fences, and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage of the realty itself." It is apparent that the growing crops, small trees, and orchards are of little or no use separated from the soil, and that their value must necessarily be determined in connection with the land on which they stand. This is not true of improvements which may be replaced at will. In Graessle v. Carpenter, 70 Iowa, 167, the defendant, by digging trenches and laying water pipes, injured the plaintiff's fences, walks, house, and shrubs. It was not shown the acts were of such a nature as to permanently injure the real estate, or that it could not be restored to its condition before the fire. The court, through Beck, J., announced the rule to be that which will "give the plaintiff just and full compensation. * * * In the case before us the familiar and simple rule applicable to such cases would perfectly attain that end. That rule is this: The plaintiff may recover as damages the sum which, expended for the purpose, would put the property in as good condition as it was in before the injury, with the additional sums which would compensate the plaintiff for the use and enjoyment of the property, should he be deprived thereof by the injury, and the value of such property, as trees, buildings, and the like, which have been wholly destroyed, and cannot be restored to the con-

dition they were in before the injury." We take it, the trees and shrubs were of a character which might be replaced by others of the same actual value; otherwise the case is not in harmony with those cited. In Freeland v. City of Muscatine, 9 Iowa, 465, the defendant, in changing the grade, dug away the dirt, and caused the plaintiff's house to fall, and it was held: "The cost of rebuilding or repairing was properly taken into consideration, if we understand it as having reference to the quality and condition of the building before the accident, and the instruction cannot be taken in any other sense. It is the cost of rebuilding and repairing, which implies the restoring it to as good a condition as before, and not the putting a new and firm building in the place of an old and decayed one." To prove the market value of the land immediately before and after the fire would be accomplishing, by circumlocution, what might be directly ascertained, for such difference would be the value of the house. True, location may sometimes have a bearing, as where a building is so situated as not to be useful for the purpose of its construction. In such cases this must be taken into consideration in fixing the real value. But it could be as readily done in estimating this separate from as with the land. Simplicity and directness are particularly favored in modern jurisprudence. True, such property may have no market value. It does, however, have actual value, and this is then the measure of recovery. The ruling was right. * * *

Affirmed.

TREANOR *v.* NEW YORK BREWERIES CO.

New York, 1906. 51 Misc. 607.

DOWLING, J. From testimony which the jury had a right to believe it was shown in this case that the plaintiff, being desirous of embarking in the saloon business, and having ascertained that he could rent a desirable location for the term of 10 years, provided he would expend $7,000 in furnishing the place with certain fixtures, and that the good will could be purchased for the sum of $250, made an agreement with the defendant, through its general manager, one Tighe, who agreed to loan plaintiff said sum of $7,000, taking a mortgage upon the lease and fixtures; the plaintiff agreeing to purchase beer made by the defendant.

Thereupon the plaintiff made the lease, paid the $250 to the former lessee for the good will of the business, paid the sum of $500 for two months' rent, and took possession of the premises, which he occupied for that time. In the meantime, after several requests to do so, the defendant's manager refused to make any loan to plaintiff. The plaintiff thereupon secured a release from his landlords upon payment to them of the sum of $500, and brought this action for breach of contract, and recovered a judgment for the sum of $1,250, made up as follows: $500 for the two months' rent paid, $250 for the good will of the business, and $500 paid for the release. The appellant claims (1) that there was no consideration for the contract; (2) that Tighe had no authority to make the contract; (3) that plaintiff can recover only nominal damages; (4) that the judgment is against the weight of evidence, and (5) that the items of damage are not recoverable.

Without a lengthy discussion of the merits of the several objections raised by the appellant, it is sufficient to say that there is sufficient testimony in the case to sustain a judgment against the defendant, but we think that as to the item of $500 paid for the rent for two months the defendant is not properly chargeable therewith. The plaintiff occupied the premises for the two months for which he paid rent. As to whether the usable value of the premises in the condition the plaintiff took them was less, equal to, or more than the amount of rent paid therefor by him, there is no evidence. Presumably, in the absence of evidence to the contrary, the premises were worth the rent paid. It is true it appears that after he had been in the premises for two months he found that, unless the proposed repairs were made, he could not successfully continue the business. Nevertheless it does not appear that he met with any loss during the two months he remained in occupancy.

Unless the plaintiff will stipulate to reduce the amount of recovery to the sum of $750, the judgment will be reversed, and a new trial ordered, with costs to appellant to abide the event. If such stipulation is made, judgment affirmed, as modified, without costs to either party.

All concur.

SILLS *v.* COCHEMS.

Colorado, 1906. 36 Col. 524.

BAILEY, J. But one question is presented for determination in this case: Is testimony tending to show that plaintiff was busily engaged in the practice of his profession admissible in an action brought by a physician to recover judgment for the value of professional services rendered, where the price to be charged for such services was not agreed upon?

It is said that "when an attorney sues upon a *quantum meruit* for professional services, his professional standing is a proper subject of inquiry as affecting the value of his services. And the amount of his professional business may be inquired into, as tending to show his professional standing." Weeks on Attorneys at Law, 681; Phelps v. Hunt, 40 Conn. 97. Counsel has called our attention to no case, and we know of none, wherein it is held that a different rule should obtain in determining the value of a physician's services. The same reasoning which prompts the doctrine as to attorneys seems to warrant its application to physicians. The value of professional services may depend very considerably upon the character and standing of him who performs them. In the first place, there are diversities of gifts. The period of time passed in the profession, the experience acquired, degree of skill, and the faculty of using professional knowledge make great differences in individuals. The services of some are worth more than the services of others, because they will command more. Should a question arise as to the value of services, in an action brought by a physician to recover fees, where the nature of the services performed makes the possession of certain qualifications to constitute an important element in the value of those services, as in this case where the plaintiff was called because of his peculiar skill as a diagnostician, evidence of professional standing is clearly admissible and is entitled to consideration.

The fact that plaintiff was extremely busy tends to show his professional standing, and tends to show, in connection with other testimony concerning the length of time he had practiced medicine in that community, his experience, which gave him the requisite knowledge and ability to properly diagnose and prescribe the necessary medicines for diseased persons. If constant practice in the art of his profession renders a practitioner more

capable than he otherwise would be, the extent of such a practice is a matter which may be properly inquired into for the purpose of determining the value of the services rendered.

The judgment of the district court will be affirmed.

Affirmed.

GABBERT, C. J., and GODDARD, J., concur.

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1. *Fluctuation in Value.*

BAKER *v.* DRAKE.

New York, 1873. 53 N. Y. 211.

RAPALLO, J. The most important question in this case is that which relates to the rule of damages. The judge at the trial, following the case of Markham v. Jaudon, 41 N. Y. 235, instructed the jury that the plaintiff, if entitled to recover, was entitled to the difference between the amount for which the stock was sold by the defendants and the highest market value which it reached at any time after such sale down to the day of trial.

This rule of damages has been recognized and adopted in several late adjudications in this State in actions for the conversion of property of fluctuating value; but its soundness, as a general rule, applicable to all cases of conversion of such property, has been seriously questioned, and is denied in various adjudications in this and other States.

This court has, in several instances, intimated a willingness to re-examine the subject, and in Mathews v. Coe, 49 N. Y. 57, per Church, C. J., stated very distinctly that an unqualified rule, giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, could not be upheld upon any sound principle of reason or justice, and that we did not regard the rule referred to so firmly settled by authority as to be beyond the reach of review, whenever an occasion should render it necessary.

Whether the present action is one for the conversion of property of the plaintiff, or for the breach of a special contract, presents a serious question, but that inquiry is perhaps unimportant on the question of damages and will be deferred for the present, and the case treated as if it were one of conversion.

Regarding it in that light, the question is whether or not, under

the circumstances of the case, the rule adopted by the court below affords the plaintiff more than a just indemnity for the loss he sustained by the sale of the stock. It is not pretended that the defendants realized any profit by the transaction, and therefore the inquiry is confined to the loss sustained by the plaintiff.

It does not appear that there was any express contract made between the parties, defining the terms upon which the defendants were to purchase or carry stocks for the plaintiff. All that appears upon that subject in the evidence is, that the plaintiff, through his friend Rogers, deposited various sums of money with the defendants, and from time to time directed them to purchase for his account shares of stock to an amount of cost from ten to twenty times greater than the sums deposited; which they did. No agreement as to margin or as to the carrying of stock by the defendants is shown by the evidence, but the plaintiff alleges in his complaint that the agreement was that he should deposit with the defendants such collateral security or margin as they should from time to time require; and that they would purchase the stock and hold and carry the same, subject to the plaintiff's direction as to the sale and disposition thereof, as long as the plaintiff should desire, and would not sell or dispose of the same unless plaintiff's margin should be exhausted or insufficient, and not then, unless they should demand of the plaintiff increased security, or require him to take and pay for the stocks, and give him due notice of the time and place of sale, and due opportunity to make good his margin.

The answer denies only the agreement to give notice of the time and place of sale, admitting by implication that in other respects the agreement is correctly set forth.

This is all that appears upon the record in reference to the contract under which the stocks were purchased.

The transactions under this contract appear in detail by a final account rendered by the defendants to the plaintiff, after the stock had been sold. This account was upon the trial admitted to be correct, the plaintiff reserving the right only to dispute certain charges of interest, which, however, if successfully assailed, would not vary the result to an extent sufficient to affect the reasoning based upon it.

From this account it appears that the plaintiff had, during the whole course of his transactions with the defendants, advanced in the aggregate but $4,240 toward the purchase of shares, which,

at the time of the alleged wrongful sale, Nov. 14, 1868, had cost the defendants upward of $66,300 over and above all the sums so advanced by the plaintiff.

By the stock lists in evidence it appears that these shares were then of the market value of less than $67,000, and the surplus arising from the sale, after paying the amount due the defendants, amounted to only $558, which sum represents the value at that time of the plaintiff's interest in the property sold.

It so happened, however, that within a few days after the sale the market price of the stock rose, and that at the time of the commencement of this action, Nov. 24, 1868, the shares would have brought some $5,500 more than the sum for which they had been sold. But after the commencement of the action, and before the trial, the stock underwent alternate elevation and depression, and reached its maximum point in August, 1869, at which time one sale, of thirty shares at 170 per cent. was proved. It afterward declined, and on the day preceding the trial, Oct. 20, 1869, the price was 143, having, for a month previous to the trial, ranged between 137 and 145.

The jury, in obedience to the rule laid down by the court, found a verdict for the plaintiff for $18,000, being just the difference between 134, which was the average price at which the defendants sold, and 170, the highest price touched before the trial; thirty-six per cent on 500 shares. More than two thirds of this supposed damage arose after the bringing of the suit.

This enormous amount of profit, given under the name of damages, could not have been arrived at except upon the unreasonable supposition, unsupported by any evidence, that the plaintiff would not only have supplied the necessary margin and caused the stock to be carried through all its fluctuations until it reached its highest point, but that he would have been so fortunate as to seize upon that precise moment to sell, thus avoiding the subsequent decline, and realizing the highest profit which could have possibly been derived from the transaction by one endowed with the supernatural power of prescience.

In a case where the loss of probable profits is claimed as an element of damage, if it be ever allowable to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in respect to it should be based upon some evidence. In respect to a dealing which, at the time of its termination, was as likely to result in further loss as in profit, to lay down as an

inflexible rule of law that as damages for its wrongful interruption the largest amount of profit which subsequent developments disclose, might, under the most favorable circumstances, have been possibly obtained from it, must be awarded to the fortunate individual who occupies the position of plaintiff, without regard to the probabilities of his realizing such profits, seems to me a wide departure from the elementary principles upon which damages have hitherto been awarded.

An amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the measure of damages which juries are usually instructed to award, except in cases where punitive damages are allowable. Before referring to the authorities which are supposed to govern the question, I will briefly suggest what would be a proper indemnity to the injured party in a case like the present, and how greatly the rule under consideration exceeds that just limit.

The plaintiff did not hold the stocks as an investment, but the object of the transaction was to have the chance of realizing a profit by their sale. He had not paid for them. The defendants had supplied all the capital embarked in the speculation, except the comparatively trifling sum which remained in their hands as margin. Assuming that the sale was in violation of the rights of the plaintiff, what was the extent of the injury inflicted upon him? He was deprived of the chance of a subsequent rise in price. But this was accompanied with the corresponding chance of a decline, or, in case of a rise, of his not availing himself of it at the proper moment; a continuance of the speculation also required him to supply further margin, and involved a risk of ultimate loss.

If, upon becoming informed of the sale, he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stock. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had declined after the sale, and the plaintiff had replaced it, or

had full opportunity to replace it, at a lower price, could it be said that he sustained any damage by the sale; would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period? If the stocks had been paid for and owned by the plaintiff, different considerations would arise, but it must be borne in mind that we are treating of a speculation carried on with the capital of the broker, and not of the customer. If the broker has violated his contract, or disposed of the stock without authority, the customer is entitled to recover such damages as would naturally be sustained in restoring himself to the position of which he has been deprived. He certainly has no right to be placed in a better position than he would be in if the wrong had not been done.

But the rule adopted in Markham v. Jaudon, passing far beyond the scope of a reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him, with his venture out, for an indefinite period, limited only by what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless, he can incur no loss, but, if at any period during the months or years occupied in the litigation the market price of the stock happens to shoot up, though it be but for a moment, he can, at the trial, take a retrospect and seize upon that happy instant as the opportunity for profit of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss. * * *

The most thorough consideration of the subject to be found in any reported case is contained in the extremely able opinion of Duer, J., in Suydam v. Jenkins, 3 Sandf. Sup. Court Reports, 619 to 647, where that accomplished jurist reviews, with great discrimination, many of the cases here referred to, and others which have not been cited, and arrives substantially at the same conclusion as that reached by Church, C. J., in Mathews v. Coe, that the highest price which the property has borne at any time between its conversion and the trial cannot in all cases be the just measure of damages. The reasoning contained in that opinion is of

such force as to outweigh the apparent preponderance of authority in favor of the rule claimed, and demonstrates its fallacy when applied to the facts of the present case, whether the cause of action be deemed for conversion of property or the breach of a contract.

When we consider the opposition which this rule has constantly encountered in the courts, the variety of the judgments in the cases in which it has been invoked, and the doubting manner in which it has been referred to by eminent jurists, whose decisions are cited in its support, it cannot be regarded as one of those settled rules to which the principle of *stare decisis* should apply. See Startup v. Cortazzi, 2 Cr., Mees. & Rosc. 165; 2 K. Com., 637, 11th ed., note; Owen v. Routh, 14 C. B. 327; Williams v. Archer, 5 Man., Gr. & Scott, 318; Archer v. Williams, 2 Car. & Kir. 26; Rand v. White Mountains R. R. Co., 40 N. H. 79; Brass v. Worth, 40 Barb. 648; Pinkerton v. Manchester R. R., 42 N. H. 424; 45 N. H. 545, and the able review of the subject in Sedgwick on Damages, pp. 550 to 555, note, 5th ed.

It seems to me, after as full an examination of the subject as circumstances have permitted, that the dissenting opinions of Grover and Woodruff, JJ., in Markham v. Jaudon, embody the sounder reasons, and that the rule of damages laid down in that case and followed in the present one is not well founded, and should not be sustained.

For this reason, without passing upon the other questions involved in the case, I think the judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

INGRAM *v.* RANKIN.

Wisconsin, 1879. 47 Wis. 406.

TAYLOR, J. * * * Upon the question of damages, the court instructed the jury as follows: "Testimony has been given in respect to the value of this property; not the value of the property at the time it was taken, but the highest value of this property at any time since the property was taken, to the present time. If the plaintiff be entitled to recover, he is entitled to recover the highest value of the property within that period of

time, from the time it was taken to the present time." To this instruction the defendants duly excepted.

After a careful consideration of the decisions of this court upon the question as to the rule of damages in actions of this kind, and an examination of a large number of cases decided by the courts of other States in this country, and by the courts of England, we are satisfied that the rule as laid down by the learned Circuit Judge is not sustained by the weight of authority, and that it ought not to be adopted by this court upon principle. We think the rule adopted by the Circuit Court would in many cases work great injustice, and violate the rule that compensation for the plaintiff's loss is the true rule of damages in all cases in which he is not entitled to exemplary damages.

* * *

It certainly cannot be said that this court has in any case decided that, either in actions for the non-delivery of chattels according to agreement, or in actions to recover damages for the conversion of the same, the plaintiff may recover as damages the highest market value of the chattels at any time intermediate the time when they should have been delivered according to contract, or the time when they were converted, and the day of trial. On the other hand, we think the uniform course of decision is, that the measure of damages is the value of the property at the time fixed for the delivery, or at the time of the conversion, with interest to the day of trial; the only exception to the rule being that in case of replevin, where the property is *in esse* and supposed to be in the hands of the defendant at the time of the trial, if plaintiff recovers, he may recover as his damages the value of the property on the day of trial, excluding any value added to the same by labor or money of the defendant, or those under whom he claims.

If the question were open for consideration in this court, and we were at liberty now to fix a rule of damages in cases like the one at bar, we should feel constrained to fix the one which has already been established by this court. It is said that the rule giving as damages the highest market value intermediate the conversion or day of delivery and the day of trial, should be applied to articles of trade and commerce which fluctuate in value from day to day; and that to adhere to the rule of value at the time of the conversion would in many cases allow the wrong-doer to make profit out of his own wrong, or at all

events it might prevent the plaintiff from taking advantage of a rising market, and thereby might deprive him of his reasonable expectations of profit from his investments.

There can be no force in the argument that the defendant would be allowed to make money out of his own tortious act. If the wrong-doer sells the property which he has unlawfully taken from another, the owner of the property can waive the tort and sue the tort-feasor for the money he has received upon such sale of his property, and thereby prevent him from making a profit out of his wrong. But the rule which allows the plaintiff to recover the highest market value is objectionable, because it allows him to recover speculative damages, especially when a long time elapses between the conversion and the day of trial. In most cases property which rapidly changes in value is not retained in the possession or ownership of one person for a great length of time; and it would be a matter of the utmost doubt whether the plaintiff, had he not been deprived of the possession of his property, would have realized the highest market value to which it might have attained during the time of the conversion and the time of trial; and in those cases where the market value is very fluctuating, great injustice would be done by this rule to the man who honestly converted such property, in the belief that it was his own, if, after the lapse of five or six years, he should be called upon to pay the highest market value it had attained during that time. The hardship of enforcing this rule in the case of stocks, which is perhaps property of the most unfixed value, forced the Court of Appeals in New York to repudiate the rule, after it had been partially adopted by the courts of that State. See Baker v. Drake, 53 N. Y. 211; Bank v. Bank, 60 N. Y. 42. * * *

The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others.

We have concluded, therefore, to adhere to the general rule laid down by this court in the cases cited, and hold that in all actions, either upon contract for the non-delivery of goods, or for the tortious taking or conversion of the same, "unless," in the language of Sedgwick (Damages, 6th ed., p. 1591), "the plaintiff is deprived of some special use of the property anticipated by the wrong-doer," and in the absence of proof of circumstances which would entitle the plaintiff to recover exemplary or punitory damages, the measure of damages is, first, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of trial; second, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the day of trial; third, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of the trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted.

These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels when defendant holds possession of the same at the time of the trial, and on the whole will be much more equitable than the rule given by the court below.

* * *

By the Court.—The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

GALIGHER *v.* JONES.

United States Supreme Court, 1889. 129 U. S. 193.

BRADLEY, J. This is a suit brought by Jones, a stockbroker, against his customer, for the balance of account alleged to be due to the plaintiff arising out of advances of money and purchases and sales made, and commissions. * * * Galigher, the defendant below, in his answer, alleged that in the month of

November, 1878, the plaintiff, as defendant's agent, held for him 600 shares of mining stock, known as "Challenge" stock; and without his consent, on the 27th and 29th of said November, sold the same for his, the plaintiff's, own use, to the damage of the defendant of $2850. * * *

As to the second item of counterclaim * * * viz.: the alleged wrongful sale by the plaintiff of 600 shares of "Challenge" stock, the referee found that the plaintiff held such stock for the defendant, and on the 27th and 29th of November, 1878, of his own motion, and without notice to the defendant, sold it for $1.25 per share; that in December the stock sold as high as $2 per share; in January the highest price was $3.10; in February the highest price was $5.50. The referee allowed the defendant the highest price in January, namely, $3.10 per share, being an advance of $1.85 above what the plaintiff sold the stock for, which, for the whole 600 shares, amounted to $1110. The reason assigned by the referee for not allowing the defendant the highest price in February (namely, $5.50 per share) was that before that time the defendant had reasonable time, after receiving notice of the sale of his stock by the plaintiff, to replace it by the purchase of new stock, if he desired so to do; and he allowed him the highest price which the stock reached within that reasonable time. In this conclusion we think the referee was correct, and as to this item we see no error in the result. * * *

It has been assumed, in the consideration of the case, that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter, to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified in the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed

market value at which they can be replaced at any time; and hence, with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust.

The rule of highest intermediate value as applied to stock transactions has been adopted in England and in several of the States in this country; whilst in some others it has not obtained. The form and extent of the rule have been the subject of much discussion and conflict of opinion. The cases will be found collected in Sedgwick on the Measure of Damages [479], vol. 2, 7th ed. 379, note (b); Mayne on Damages, 83 (92 Law Lib.); 1 Smith's Lead. Cas. (7 Amer. ed.) 367. The English cases usually referred to are Cud v. Rutter, 1 P. Wms. 572, 4th ed. [London, 1777], note (3); Owen v. Routh, 14 C. B. 327; Loder v. Kekule, 3 C. B. (N. S.) 128; France v. Gaudet, L. R. 6 Q. B. 199. It is laid down in these cases that where there has been a loan of stock and a breach of the agreement to replace it, the measure of damages will be the value of the stock at its highest price on or before the day of trial.

The same rule was approved by the Supreme Court of Pennsylvania in Bank of Montgomery v. Reese, 26 Penn. St. (2 Casey), 143, and Musgrave v. Beckendorff, 53 Penn. St. (3 P. F. Smith) 310. But it has been restricted in that State to cases in which a true relation exists between the parties,—a relation which would probably be deemed to exist between a stock-broker and his client. See Wilson v. Whitaker, 49 Penn. St. (13 Wright) 114; Huntingdon R. R. Co. v. English, 86 Penn. St. 247.

Perhaps more transactions of this kind arise in the State of New York than in all other parts of the country. The rule of highest intermediate value up to the time of trial formerly prevailed in that State, and may be found laid down in Romaine v. Van Allen, 26 N. Y. 309, and Markham v. Jaudon, 41 N. Y. 235, and other cases,—although the rigid application of the rule was deprecated by the New York Superior Court in an able opinion by Judge Duer, in Suydam v. Jenkins, 3 Sandford, N. Y. 614. The hardship which arose from estimating the damages by the highest price up to the time of trial, which might be years after the transaction occurred, was often so great, that the Court of Appeals of New York was constrained to introduce a material

modification in the form of the rule, and to hold the true and just measure of damages in these cases to be, the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. This modification of the rule was very ably enforced in an opinion of the Court of Appeals delivered by Judge Rapallo, in the case of Baker v. Drake, 53 N. Y. 211, which was subsequently followed in the same case in 66 N. Y. 211, and in Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368; and Wright v. Bank of Metropolis, 110 N. Y. 237.

It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole it seems to us that the New York rule, as finally settled by the Court of Appeals, has the most reasons in its favor, and we adopt it as a correct view of the law.

The judgment is reversed and the cause remanded to the Supreme Court of Utah with instructions to enter judgment in conformity with this opinion.

A race-horse was killed at Panama, where there is no market for such property. Held that market value at San Francisco, the place of destination, could be shown. Harris v. Panama R. R., 58 N. Y. 660. The same doctrine was announced in a case of the conversion of a ship. Glasby v. Cabot, 135 Mass. 435. The risk of getting the ship to the market should be considered also.

But the general rule of damages in case of conversion of personal property is the value at the time of conversion and interest on its fair value from that time. Redmond v. Am. Mfg. Co., 121 N. Y. 415.

In estimating the value of a life estate the Carlisle tables are admissible in evidence, in connection with expert testimony of computations thereunder. City of Joliet v. Blower, 155 Ill. 414. See, too, Kerrigan v. Penn. R. R. Co., 44 Atl. Rep. 1069.

Where sawmill property was wrongfully attached and bankruptcy resulted, the measure of damages was held to be the loss of its use, not injury to credit. Union Nat. Bank v. Cross, 100 Wis. 187.

Where through mining operations permanent injuries to land result from failure to give surface support, the measure of damages is the depreciation of the value of the land. Weaver v. Berwind, 216 Pa. 195.

Where a railroad company has been cutting timber on the lands of the United States, the defendant must pay as damages the value of the timber at the time and place of the cutting, not of the delivery. U. S. v. St. Anthony R. R. Co., 192 U. S. 541. So where an animal is killed as having tuberculosis, the value of the animal is estimated as an animal in a diseased condition. Tappen v. State of New York, 146 N. Y. 44. Where shade trees have been destroyed, the rule of damages is to ascertain the difference between the value of the land before and after the injury. Evans v. Keystone Gas Co., 148 N. Y. 112.

XII. MITIGATION OF DAMAGES.

CURRIER *v.* SWAN.

Maine, 1874. 63 Me. 323.

PETERS, J. An affray took place between the plaintiff and one of the defendants, at a railroad depot in the afternoon, and on the evening of the same day that defendant with the others proceeded to the plaintiff's house, and inflicted violence upon him there. The defendants desired to show what took place in the afternoon, in mitigation of damages for the assault committed afterwards. The justice presiding admitted in evidence the fact that there had been an affray, but excluded evidence of the details of it.

The ruling, both as to the admission and exclusion of evidence, was right. The admission was right, because it was to show the object and purpose of the second assault, or the state of mind with which it was done. Otherwise, there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of a previous affray might have some weight upon the question of the amount of damages recoverable, and might legitimately be regarded as a part of the transaction to be investigated in this suit. But the further evidence, offered and excluded, was not fairly a part of the facts involved in this investigation. The assault complained of here was committed at another time and at another place, and mostly by other parties. It was immaterial whether the fault of the previous affray was in the one or the other party concerned. If the defendant was ever so right in the first affray, he should have resorted to proper legal remedies, and not assume to take the law into his own hands. If he is permitted to show the merits of the controversy in the afternoon, then the plaintiff would have as much right to show the provocation that led him into that affray, and the result would be, the trial of several causes in one; and, as said in Mathews v. Terry, 10 Conn. 459, "the jury would be distracted with a multiplicity of questions and issues." The early and leading case of

Avery v. Ray, 1 Mass. 12, decided in 1812, has been recognized as a correct authority upon this subject, in most of the courts in this country, ever since. It has been invariably followed in Massachusetts, in many subsequent cases. Of course, the general principle there enunciated may be modified by controlling circumstances in other cases; as in Prentiss v. Shaw, 56 Me. 437, cited and much relied on by these defendants. That case was decided upon its peculiar facts. The evidence introduced in mitigation there was mainly to show the innocent intention of the parties sued. They supposed (as they claimed) that they were acting under an official right to act. They had received (although improperly) an order, from persons in authority, to make the arrest. Their own motive and good faith in obeying the order, had much to do with the question as to how far punitive damages should be recovered. So in the case at bar, as much evidence was admitted as would fairly show what the motive of the defendants was in the assault committed by them, and with what coolness and deliberation, or otherwise, the act was done.

The other exception in this case can not be sustained. But one verdict could be rendered. Therefore the damages must be joint, and not several. The question is, what damages has the plaintiff sustained? For those, whatever they are, all the participants in the assault are liable. There are no degrees of guilt. These principles are clearly settled and stated in the cases cited in argument. * * * The general verdict must stand.

Exceptions and motion overruled.

All concur.

GOLDSMITH *v.* JOY.

Vermont, 1889. 61 Vt. 488.

TRESPASS for assault and battery upon plaintiff's intestate, who at the time of the affray was suffering from Bright's disease and subsequently died of it. It was claimed that his death was materially hastened by the assault. Verdict and judgment for plaintiff. Exceptions by the defendant.

In instructing the jury, the court, among other things, said: "Now, then in respect to that question, mere words made use of by one person to another are no legal excuse whatever for the infliction of personal violence. It makes no difference how violent

the language used may be, no man has the right to use personal violence upon another when he is induced to simply by the use of words. That is no defense to the action. But when you come to the question of whether a particular case is one that deserves the awarding of exemplary damages, then you are to consider all the circumstances in the case, the provocation, if any, that the defendant had, and everything that is calculated on the one hand to aggravate his act, and on the other hand to palliate his act, are to be considered.

"As I have already said on the main question of compensatory damages, there is no defense here whatever. No matter what was said, no matter how much provocation the defendant had, he is bound to answer for the compensatory damages at any event. As to exemplary damages, in the exercise of a wise discretion you will not allow them unless you are satisfied that the act of the defendant was high-handed, wanton and inexcusable, and in determining that question you are to take into view all the provocation that he had. Now, then, gentlemen, if the provocation was slight, it is quite different, and it should have less weight in determining the question whether you shall award exemplary damages than it would have if the provocation was great."

TYLER, J. The court instructed the jury that there was no defense to the claim for actual or compensatory damages; that words were no legal excuse for the infliction of personal violence; that no matter how great the provocation, the defendant was bound in any event to answer for these damages.

It is a general and wholesome rule of law that whenever, by an act which he could have avoided and which cannot be justified in law, a person inflicts an immediate injury by force, he is legally answerable in damages to the party injured.

The question whether provocative words may be given in evidence under the general issue to reduce actual damages in an action of trespass for an assault and battery has undergone wide discussion.

The English cases lay down the general rule that provocation may mitigate damages. The case of Frazer v. Berkeley, 7 C. & P. 789, is often referred to, in which LORD ABINGER held that evidence might be given to show that the plaintiff in some degree brought the thing upon himself; that it would be an unwise law if it did not make allowance for human infirmities; and if a per-

son commit violence at a time when he is smarting under immediate provocation, that is matter of mitigation.

TINDAL, Ch. J., in Perkins v. Vaughan, 5 Scott's N. R. 881, said: "I think it will be found that the result of the cases is that the matter cannot be given in evidence where it amounts to a defense, but that where it does not amount to a defense, it may be given in mitigation of damages." Linford v. Lake, 3 H. & N. 275; Addison on Torts, § 1393, recognizes the same rule.

In this country, 2 Greenl. on Ev., § 93, states the rule that a provocation by the plaintiff may be thus shown if so recent as to induce a presumption that violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. The earlier cases commonly cited in support of this rule are Cushman v. Ryan, 1 Story, 100; Avery v. Ray, 1 Mass. 12; Lee v. Woolsey, 19 Johns. 241; and Maynard v. Berkeley, 7 Wend. 560. The Supreme Court of Massachusetts has generally recognized the doctrine that immediate provocation may mitigate actual damages of this kind. Mowry v. Smith, 9 Allen, 67; Tyson v. Booth, 100 Mass. 258; Bonino v. Caledonio, 144 Mass. 299. It is also said in 2 Sedgwick (7th ed.), 521: "If, making due allowance for the infirmities of human temper, the defendant has reasonable excuse for the violation of public order, then there is no foundation for exemplary damages, and the plaintiff can claim only compensation. It is merely the corollary of this, that when there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages. If it were not so the plaintiff would get full compensation for damages occasioned by himself. The rule ought to be and is, practically, mutual. Malice and provocation in the defendant are punished by inflicting damages exceeding the measure of compensation, and in the plaintiff by giving him less than that measure."

In Burke v. Melvin, 45 Conn. 243, PARK, Ch. J., held that the whole transaction should go to the jury. "They could not ascertain what amount of damages the plaintiff was entitled to receive by considering a part of the transaction. They must look at the whole of it. They must ascertain how far the plaintiff was in fault, if in fault at all, and how far the defendant, and give damages accordingly. The difference between a pro-

voked and an unprovoked assault is obvious. The latter would deserve punishment beyond the actual damages, while the damages in the other case would be attributable, in a great measure, to the misconduct of the plaintiff himself." In Bartram v. Stone, 31 Conn. 159, it was held that in an action for assault and battery the defendant might prove, in mitigation of damages, that the plaintiff, immediately before the assault, charged him with a crime, and that his assault upon the plaintiff was occasioned by "sudden heat," produced by the plaintiff's false accusation. See also Richardson v. Hine, 42 Conn. 206.

In Kiff v. Youmans, 86 N. Y. 324, the plaintiff was upon defendant's premises for the purpose of committing a trespass, and the defendant assaulted him to prevent the act, and the only question was whether he used unnecessary force. DANFORTH, J., said: "It still remains that the plaintiff provoked the trespass, was himself guilty of the act which led to the disturbance of the public peace. Although this provocation fails to justify the defendant, it may be relied upon by him in mitigation even of compensatory damages. This doctrine is as old as the action of trespass, and is correlative to the rule which permits circumstances of aggravation, such as time and place of an assault, or insulting words, or other circumstances of indignity and contumely to increase them."

In Robinson v. Rupert, 23 Pa. St. 523, the same rule is adopted, the court saying: "Where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient to entirely justify the act done, there can be no exemplary damages, and the circumstances of mitigation must be applied to the actual damages."

In Ireland v. Elliott, 5 Ia. 478, the court said: "The farthest that the law has gone, and the farthest that it can go, whilst attempting to maintain a rule, is to permit the high provocation of language to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages."

In Thrall v. Knapp, 17 Ia. 468, the court said: "The clear distinction is this: contemporaneous provocation of words or acts are admissible, but previous provocations are not, and the test is whether, 'the blood has had time to cool.'" * * * "The law affords a redress for every injury. If the plaintiff slandered defendant's daughters, it would entirely accord with

his natural feeling to chastise him; but the policy of the law is against his right to do so, especially after time for reflection. It affords a peaceful remedy. On the other hand the law so completely disfavors violence, and so jealously guards alike individual rights and the public peace that, if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little diachylon, yet he shall have his action." Per Lord Holt, 2 Ld. Raym. 955. The reasoning of the court seems to make against his rule that provocations such as happen at the time of the assault may be received in evidence to reduce the amount of the plaintiff's recovery.

In Moreley and Wife v. Dunbar, 24 Wis. 183, DIXON, Ch. J., held, that notwithstanding what was said in Birchard v. Booth, 4 Wis. 85, circumstances of provocation attending the transaction, or so recent as to constitute a part of the *res gestæ*, though not sufficient entirely to justify the act done, may constitute an excuse that may mitigate the actual damages; and, where the provocation is great and calculated to excite strong feelings of resentment, may reduce them to a sum which is merely nominal. But in Wilson v. Young, 31 Wis. 574, it was held by a majority of the court that provocation could go to reduce compensatory damages only so far as these should be given for injury to the feelings, DIXON, Ch. J., however, adhering to the rule in Moreley v. Dunbar, that it might go to reduce all compensatory damages; but in Fenelon v. Butts, 53 Wis. 344, and in Corcoran v. Harron, 55 Wis. 120, it was clearly held that personal abuse of the assailant by the party assaulted may be considered in mitigation of punitory, but not of actual damages, which include those allowed for mental and bodily suffering; that a man commencing an assault and battery under such circumstances of provocation is liable for the actual damages which result from such assault.

In Donnelly v. Harris et al., 41 Ill. 126, the court instructed the jury that words spoken might be considered in mitigation of damages. WALKER, Ch. J., in delivering the opinion of the Supreme Court remarked: "Had this modification been limited to exemplary damages it would have been correct, but it may well have been understood by the jury as applying to actual damages, and they would thus have been misled. To allow them the effect to mitigate actual damages would be virtually to allow them to be used as a defense. To say they constitute no defense, and then say they may mitigate all but nominal damages, would, we

think, be doing by indirection what has been prohibited from being done directly. To give to words this effect, would be to abrogate, in effect, one of the most firmly established rules of the law." See also Ogden v. Claycomb, 52 Ill. 366. In Gizler v. Witzel, 82 Ill. 322, the court said in reference to the charge of the court below: "The third instruction tells the jury among other things that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned, and even if he went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense."

In Norris v. Casel, 90 Ind. 143, this precise question was not raised, but the court said in reference to the instructions of the court below, that the first part of the charge, that the provocation by mere words, however gross and abusive, cannot justify an assault, was correct, and that a person who makes such words a pretext for committing an assault, commits thereby not only a mere wrong, but a crime, and the person so assaulted is not deprived of the right of reasonable self-defense, even though he used the insulting language to provoke the assault against which he defends himself; but whatever may have been his purpose in using the abusive language, it cannot be made an excuse for the assault.

Johnson v. McKee, 27 Mich. 471, was a case very similar to the one at bar, and was given to the jury under like instructions. The Supreme Court said: "In regard to provocation, the court charged in effect, that if plaintiff provoked defendant, and the assault was the result of that provocation, he could recover nothing beyond his actual damages and outlays, and would be precluded from claiming any damages for injured feelings or mental anxiety. In other words he would be cut off from all the aggravated damages allowed in cases of willful injury, and sometimes loosely called exemplary damages. As there is no case in which a party who is damaged and is allowed to recover anything substantial, cannot recover his actual damages, the rule laid down by the court was certainly quite liberal enough, and if any one could complain it was not the defendant."

The court said in Prentiss v. Shaw, 56 Me. 712: "We understand the rule to be this: a party shall recover as a pecuniary recompense the amount of money which shall be a remuner-

ation, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. * * * If the assault was illegal and unjustified, why is not the plaintiff in such case entitled to the benefit of the general rule, before stated, that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act. * * * Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for a reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, * * * must not the defendant be held to pay the full value of the horse thus rendered useless?" The learned judge admits that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show, on one side, aggravation, and on the other, mitigation of the damages claimed, but he holds the law to be that mitigating circumstances can only be set against exemplary damages, and cannot be used to reduce the actual damages directly resulting from the defendant's unlawful act.

In a learned article on damages, in actions *ex delicto*, 3 Am. Jur. 287, it is said: "If the law awards damages for an injury, it would seem absurd, even without resorting to the definition of damages, to say that they shall be for a part only of the injury."

"It is a reasonable and a legal principle that the compensation should be equivalent to the injury. There may be some occasional departures from this principle, but I think it will be found safest to adhere to it in all cases proper for a legal indemnification in the shape of damages." Ch. J. Shippen, 4 Dall. 207.

Jacobs v. Hoover, 9 Minn. 204, Cushman v. Waddell, Baldwin, 57, and McBride v. McLaughlin, 5 Watts, 375, are strong authorities in support of the rule that provocative language used by the plaintiff at the time of the battery should be given in evidence only in mitigation of exemplary damages, and that unless the plaintiff has given the defendant a provocation amounting in law to a justification he is entitled to receive compensation for the actual injury sustained.

If provocative words may mitigate, it follows that they may reduce the damages to a mere nominal sum and thus practically

justify an assault and battery. But why under this rule may they not fully justify? If in one case, the provocation is so great that the jury may award only nominal damages, why, in another, in which the provocation is far greater, should they not be permitted to acquit the defendant and thus overturn the well-settled rule of law, that words cannot justify an assault? On the other hand if words cannot justify they should not mitigate. A defendant should not be heard to say that the plaintiff was first in the wrong by abusing him with insulting words and therefore, though he struck and injured the plaintiff, he was only partly in the wrong and should pay only part of the actual damages.

If the right of the plaintiff to recover actual damages were in any degree dependent on the defendant's intent, then the plaintiff's provocation to the defendant to commit the assault upon him would be legitimate evidence bearing upon that question, but it is not. Even lunatics and idiots are liable for actual damages done by them to the property or person of another, and certainly a person in the full possession of his faculties should be held liable for his actual injuries to another unless done in self-defense or under reasonable apprehension that the plaintiff was about to do him bodily harm. The law is that a person is liable in an action of trespass for an assault and battery, although the plaintiff made the first assault, if the defendant used more force than was necessary for his protection, and the symmetry of the law is better preserved by holding that the defendant's liability for actual damages begins with the beginning of his own wrongful act. It is certainly in accordance with what this court held in Howland v. Day & Dean, 56 Vt. 318, that, "That law abhors the use of force either for attack or defense, and never permits its use unnecessarily."

Exemplary damages are not recoverable as matter of right, but as was stated by WHEELER, J., in Earl and Wife v. Tupper, 45 Vt. 275, they are given to stamp the condemnation of the jury upon the acts of the defendant on account of their malicious or oppressive character. Boardman v. Goldsmith, 48 Vt. 403, and cases cited; Mayne on Dam. 5865; Voltz v. Blackmer, 64 N. Y. 440.

The instructions to the jury upon this branch of the case were in substantial accordance with the law as above stated. As exemplary damages were awardable in the discretion of the

jury, the charge was also correct that the influence of an example in a case of this kind depended on the character and standing of the parties involved.

We find no error in the charge, and the judgment is affirmed.

NICKOLL *v.* ASHTON.

L. R. 1900. 2 Q. B. 298.

MATHEW, J. This is an action brought to recover damages for breach of a contract dated October 24, 1899, whereby the defendants sold to the plaintiffs a cargo of Egyptian cotton-seed to be shipped at Alexandria, Port Said and Ismailia during the month of January, 1900, by the steamship Orlando at 6 l. 3s. 9d. per ton. After the contract had been so made the Orlando, which was then in the Baltic, was stranded by perils of the sea, and was so damaged as to render it impossible for her to arrive at the port of loading within the time stipulated; and notice of that fact was on December 20 given to the plaintiffs. Thereupon there was a proposal made to settle any dispute between the parties by arbitration; but the attempt to arbitrate became abortive, and the case came into court and was tried before me.

It was contended on behalf of the plaintiffs that the contract to ship the cargo in January was absolute, and that a warranty should therefore be implied that the ship would then be fit to take the cargo on board. It was said that the defendants, not having provided by the terms of their contract against such a contingency, took upon themselves the risk of the ship being lost or disabled by perils of the sea. The principle upon which the plaintiffs rested their contention is indicated in a number of cases of which the recent case of Ashmore & Son v. Cox & Co., 1899, 1 Q. B. 436, is an instance.

On the other hand, it was contended for the defendants that it was unreasonable to imply such a warranty, for no man of business would be likely in such a contract to insure the safety of the ship from the date of the contract till the following January. Both parties, it was said, assumed that the ship would be fit to fulfill her engagement, and therefore had contemplated her continued existence and fitness to take the cargo

on board as the basis of what was to be done. It was argued that a condition ought to be implied that the defendants should be excused from performance of the contract when performance became impossible by the loss or damage of the ship by sea peril. Many cases were cited in support of this contention but reliance was principally placed upon the statement of the law by Blackburn, J., in Taylor v. Caldwell, 3 B. & S. at p. 833, which is in these terms: "There seems no doubt that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has became unexpectedly burthensome or even impossible. * * * But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." In the course of argument cases were referred to as showing that that principle is well established in the law, and it may be pointed out that it is recognized in the Sale of Goods Act, 1893, s. 7 of which provides that "Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided." It seems to me that the defendants' contention is right, and that under the circumstances the contract was at an end. It had become impossible of performance, and the condition ought to be implied that neither party was to be bound.

It was further contended for the plaintiffs that, although such an implication might arise under other circumstances, it was not reasonable having regard to the provisions of clause 5

of the contract, which was in the following terms: "In case of prohibition of export, blockade, or hostilities, preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." It was said that that clause contained the sole conditions on which the contract was not to be binding, and that no additional condition ought to be implied, upon the principle that *expressum facit cessare tacitum.* The conditions, however, are not repugnant. They are all useful and reasonable. And the implied condition contended for by the defendants applies to a different stage of the transaction from that contemplated by clause 5. I therefore think that that contention of the plaintiff fails.

But then it was asked, How far is the implication of this condition to go? Is it to be implied in all cases, as, for example, where the shipowner sends the vessel to another port, or absolutely refuses to take the cargo on board? The answer is that in such a case the implication would not be reasonable, for the plaintiffs would naturally assume that the defendants were protected by a contract of charterparty which would bind the shipowner to take the cargo on board, and that there would consequently be a remedy over against him if he refused to do so.

There is one other matter which was much discussed in argument, and to which, although it is unnecessary for the purposes of my judgment, I should like to refer, and that is the question as to what would have been the proper measure of damages if the plaintiffs had been entitled to recover. It appeared that towards the end of December the plaintiffs might have obtained another cargo at the then market price, which was much lower than the price at the end of January. But it was insisted for the plaintiffs that they were entitled to wait and watch the rising market until the end of January, and then claim their damages on the footing of the then market price. In my opinion that contention was wholly untenable. Having regard to the decision in Roth & Co. v. Taysen, 1 Com. Cas. 306, I think the plaintiffs were bound to endeavor to mitigate the loss by acting as ordinary men of business would have acted, that is to say, by determining the liability at the earliest date at which they were able to obtain another cargo. There must be judgment for the defendants.

Judgment for defendants.

In an action of trespass *de bonis asportatis*, when the goods taken by the trespasser are restored to the plaintiff and accepted by him, that fact may be shown in mitigation of damages. Hopple v. Higbee, 3 Zab. 342.

Evidence of the plaintiff's general bad character, in an action of slander, is admissible in mitigation of damages. Sayre v. Sayre, 1 Dutcher 235.

In an action for slander imputing unchastity to a married woman, the wife of plaintiff, it is allowable for defendant to prove the woman's general reputation for chastity was bad. Duval v. Davey, 32 Oh. St. 604.

Sick benefits received by the plaintiff from any source other than the defendant cannot be considered by the jury in making up their verdict. Baltimore City Passenger Ry. Co. v. Baer, 90 Md. 97.

XIII. INTEREST.

ATWOOD *v.* BOSTON FORWARDING & TRANSFER CO.

Massachusetts, 1904. 185 Mass. 557.

KNOWLTON, C. J. The plaintiffs' horse was seriously injured through negligence for which the defendant is liable, and, after unavailing efforts for nearly a month to cure him, he was killed. The exceptions relate to the question whether the plaintiffs, having a reasonable expectation that the horse could be cured, and that their damages could be lessened by an attempt to cure him, are entitled to recover such a sum as they reasonably and prudently expended in making this attempt. The defendant asked the court to rule that in no event can the damages exceed the value of the horse at the time of the injury.

When an animal is killed throught the fault of the defendant, the damage which the owner may recover is the value of the animal at the time of the injury. But if an animal is injured in such a way that proper care and attention reasonably may be expected to effect a cure, which will leave the damage from the injury much less than if he died, it is the duty of the owner to give it such care and attention, in order that the damages may not be augmented by neglect. Tindall v. Bell, 11 M. & W. 228; Graves v. Moses, 13 Minn. 337. The expense properly incurred for this purpose is a part of the damage to the owner, for which he is entitled to compensation, as well as for the diminution in value or other loss that may finally result directly from the injury notwithstanding these efforts. Gillett v. Western Railroad Co., 8 Allen, 560; Johnson v. Holyoke, 105 Mass. 80; Wheeler v. Town of Townshend, 42 Vt. 15; Street v. Laumier, 34 Mo. 469. These expenses reasonably incurred in making a proper effort to diminish the loss are to be paid as well when the effort is unavailing as when it is successful. It would be most unjust to impose upon an owner the duty of trying to effect a cure, if that is what ought to be done, and to leave him remediless for expenses so incurred if his attempt proves unsuccessful. Of course, he is bound to act in good faith, and to exercise a

sound discretion, so as not to make an unreasonable expenditure, in reference to the probability of diminishing the damages; but if money is prudently expended in the hope of mitigating the injury, and notwithstanding this the animal is lost, there is no good reason why this expense, as well as the value of the animal, should not be included as a part of the damages. This is in accordance with the weight of authority. Watson v. Proprietors of the Lisbon Bridge, 14 Me. 201; Board of Commissioners of Sullivan County v. Arnett, 116 Ind. 438; Gulf, C. & S. F. R. Co. v. Keith, 74 Tex. 287; St. Louis, I. M. & S. Railway v. Biggs, 50 Ark. 169. See, also, Ellis v. Hilton, 78 Mich. 150; 2 Sedgwick on Dam. (8th Ed.) 17; 1 Sutherland on Dam. (3d Ed.) § 67. We are of opinion that there was no error in the ruling given on this point.

The defendant contends that the jury ought not to have been instructed to add interest in making up their verdict. We think that in this commonwealth interest, *eo nomine*, is not allowed in this class of cases, but that, in determining the amount of damages, the jury may consider the lapse of time since the injury, and the fact that their assessment is to be made on the day of the verdict for a loss which occurred a long time before. This may be necessary to make the compensation adequate. Frazer v. Bigelow Carpet Co., 141 Mass. 126; Ainsworth v. Laking, 180 Mass. 397-402. For the reasons stated in the case last cited, we do not think the defendant is shown to have been injured, so as to make a new trial necessary.

Exceptions overruled.

BERNHARD *v.* ROCHESTER GERMAN INS. CO.

Connecticut, 1906. 79 Conn. 388.

Action to recover on a fire insurance policy, brought in the Superior Court, where a demurrer to the complaint was overruled. A judgment was rendered for the plaintiff and defendant appeals.

PRENTICE, J. The defendant issued its policies to the plaintiff upon his dwelling house and its contents. A fire occurred. The insured is now seeking to recover upon the policies on account of the loss thereby occasioned. The facts found disclose (1)

that the required proofs of loss were not furnished to the defendant within the time prescribed therefor; and (2) that no award has been made by the appraisers to whom the ascertainment of the amounts of loss had, prior to the suit, been submitted. The defendant contends that each of these facts is sufficient to preclude the plaintiff's recovery. * * *

In rendering judgment the court included interest from July 1, 1901, being the date of the defendant's repudiation of liability, upon the amount of the loss upon the personal property, but none upon the amount of the building loss. The defendant complains of the inclusion of this interest. The court made its distinction between the two losses upon the ground that the latter loss was not definitely ascertainable until it was determined by the judgment of the court, while there was no serious controversy between the parties as to the amount of the former. There was no error in the action of the court; neither would there have been had interest upon the other loss been included. By the inclusion of interest upon the amounts which the policies obligated the defendant to pay from the time when it refused recognition of any liability and put an end to the prescribed processes of adjustment, and by such inclusion only could the court compensate the plaintiff for what he had suffered by reason of the delay resulting from the defendant's wrongful act. "Interest by our law is allowed on the ground of some contract, express or implied, to pay it, or as damage for the breach of some contract or the violation of some duty." Selleck v. French, 1 Conn. 32, 33, 6 Am. Dec. 185. This court has never adopted for general application the arbitrary rule that interest upon unliquidated demands will not be allowed as damages. On the contrary, we have long and repeatedly held that, in certain classes of cases, such an element of damage was one to be properly taken into account. White v. Webb, 15 Conn. 305; Clark v. Whittaker, 19 Conn. 319, 48 Am. Dec. 160; Cook v. Loomis, 26 Conn. 483; Oviatt v. Pond, 29 Conn. 479, 485; Clark v. Clark, 46 Conn. 586, 590; Union Hardware Co. v. Plume & Atwood Mfg. Co., 58 Conn. 219, 222, 20 Atl. 455; Regan v. New York & N. E. R. Co., 60 Conn. 124, 142, 22 Atl. 503, 25 Am. St. Rep. 306; Healy v. Fallon, 69 Conn. 235, 37 Atl. 495; New York, N. H. & H. R. Co. v. Ansonia L. & W. P. Co., 72 Conn. 703, 705, 46 Atl. 157.

The purpose sought in awarding damages other than vindictive

is to make a fair compensation to one who has suffered an injury. Barker v. Lewis Storage & Transfer Co., 78 Conn. 198. Courts are more and more coming to recognize that a rule forbidding an allowance for interest upon unliquidated damages is one well calculated to defeat that purpose in many cases, and that no right reason exists for drawing an arbitrary distinction between liquidated and unliquidated damages. Sedgwick on Damages (8th Ed.) §§ 299, 300, 312, 315. There are actions to which the suggested rule is applicable. Regan v. New York & N. E. R. Co., 60 Conn. 124. Others, however, present conditions where without an allowance for interest, although the demand may be unliquidated, fair compensation for the injury done would not be accorded and justice thus denied. The determination of whether or no interest is to be recognized as a proper element of damage is one to be made in view of the demands of justice rather than through the application of any arbitrary rule. New York, N. H. & H. R. Co. v. Ansonia L. & W. P. Co., 72 Conn. 703, 705.

There is no error. The other Judges concurred.

In actions for tort, in absence of statute, interest is not in general allowable as an absolute right. Drumm-Flato Com'n. Co. v. Edmisson, 208 U. S. 534.

In Frazer v. Bigelow Carpet Co. 141 Mass. 126, it was held that in action for the negligent destruction of property interest is allowed.

Interest is not allowed as a matter of law in cases of tort. Its allowance as damages rests in the discretion of the jury. Lincoln v. Claflin 7 Wall. 139.

A partner who fails to pay in his contribution to the capital stock is liable for interest thereon. Delp v. Edlis, 190 Pa. 25.

Bonds and coupons by universal usage and custom have all the qualities of commercial paper and interest is allowed upon them. Aurora City v. West, 7 Wall. 82.

In a case of eminent domain, interest cannot be allowed until the possession of the property has been taken. South Park Com'r. v. Dunlevy, 91 Ill. 49. See also Old Colony Railroad v. Miller, 125 Mass. 1.

In an action for rent, the defendant can be charged with interest upon each item of rent from the time when it fell due. Van Rensselaer v. Jewett, 2 N. Y. 135.

Interest is not allowed in a case of personal injuries resulting from the negligence of the defendant. Louisville & Nashville Ry. Co. v. Wallace, 91 Tenn. 35.

XIV. EXPENSES OF LITIGATION.

DAY *v.* WOODWORTH.

United States Supreme Court, 1851. 13 How. 363.

This was an action of trespass quare clausum fregit, brought by Day, a citizen of New York against the defendants for pulling down a mill-dam in Great Barrington, Masschusetts.

GRIER, J. * * * The great question on the trial of this case, appears to have been whether the plaintiff's dam was higher than he had a right to maintain it, and if so, whether the defendants had torn down more of it, or made it lower than they had a right to do.

The plaintiff's counsel requested the court to instruct the jury that "they might allow counsel-fees, etc., if there was any expense in taking down more of the dam than was justifiable," and gave as a reason that the defendants thereby became trespassers *ab initio*.

The court instructed the jury "that if they should find for the plaintiff on the first ground, viz., that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not anything for counsel fees or extra compensation to engineers."

This instruction of the court is excepted to, on two grounds. First, because "this being an action of trespass, the plaintiff was not limited to actual damages proved," and secondly, that the jury, under the conditions stated in the charge, should have been instructed to include in their verdict for the plaintiff, not only the actual damages suffered, but his counsel fees and other expenses incurred in prosecuting his suit.

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his

offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

This doctrine about the right of the jury to include in their verdict, in certain cases, a sum sufficient to indemnify the plaintiff for counsel fees and other real or supposed expenses over and above taxed costs, seems to have been borrowed from the civil law and the practice of the courts of admiralty. At first, by the common law, no costs were awarded to either party, *eo nomine*. If the plaintiff failed to recover he was amerced *pro falso clamore*. If he recovered judgment, the defendant was *in misericordia* for his unjust detention of the plaintiff's debt, and was not

therefore punished with the *expensa litis* under that title. But this being considered a great hardship, the statute of Gloucester (6 Edw. 1, c. 1) was passed, which gave costs in all cases when the plaintiff recovered damages. This was the origin of costs *de incremento;* for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. Costs.

Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is especially so in this country (where the legislatures of the different States have so much reduced attorneys' fee-bills, and refused to allow the *honorarium* paid to counsel to be exacted from the losing party), that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as *expensa litis.* If the jury may, "if they see fit," allow counsel fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs *de incremento,* the defendants may be truly said to be *in misericordia,* being at the mercy both of court and jury. Neither the common law, nor the statute law of any State, so far as we are informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption either by courts or legislatures.

The only instance where this power of increasing the "actual damages" is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the "actual damages" incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigious, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first, at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant over and above taxed costs are usually as great as those of plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his

favor, or amerce the plaintiff *pro falso clamore* beyond tax costs. Where such a rule of law exists allowing the jury to find costs *de incremento* in the shape of counsel fees, or that equally indefinite and unknown quantity denominated (in the plaintiff's prayer for instruction) "&c.," they should be permitted to do the same for the defendant where he succeeds in his defense, otherwise the parties are not suffered to contend in an equal field. Besides, in actions of debt, covenant, and assumpsit, where the plaintiff always recovers his actual damages, he can recover but legal costs as compensation for his expenditure in the suit, and as punishment of defendant for his unjust detention of the debt; and it is a moral offence of no higher order, to refuse to pay the price of a patent or the damages for a trespass, which is not wilful or malicious, than to refuse the payment of a just debt. There is no reason, therefore, why the law should give the plaintiff such an advantage over the defendant in one case, and refuse it in the other. See Barnard v. Poor, 21 Pickering, 382; and Lincoln v. the Saratoga Railroad, 29 Wendell, 435.

We are of the opinion, therefore, that the instruction given by the court in answer to the prayer of the plaintiff, was correct.

The instruction to the jury, also, was clearly proper as respected the measure of damages, and that the jury had nothing to do with the question whether their verdict would carry costs.

The judgment is therefore affirmed.

AGIUS *v.* GREAT WESTERN COLLIERY COMPANY.

L. R. 1899. 1 Q. B. 413.

Action for breach of contract by defendants for supply of coal to plaintiff. Plaintiff had contracted with one Nye to supply bunker coal for his, Nye's steamers; and, not having such coal owing to defendant's breach, he was sued by Nye and subjected to costs and extra costs. Plaintiff then brought this action, claiming as damages the money paid as costs, which he duly secured and defendant appeals.

EARL OF HALSBURY, L. C. I am of opinion that this appeal must be dismissed. Only one question of any substance remains to be decided in this case. With regard to the question whether there was a breach by the defendants of their contract, it ap-

pears to me that there was ample evidence of such a breach. It is really unnecessary to retry that question, which was very faintly contested before the learned judge at the trial. It being, therefore, sufficiently proved, and practically uncontested, that there was a breach of contract by the defendants, the question arises, what amount of damage is recoverable for that breach of contract? Upon the hypothesis that there was a breach of contract, it was ultimately admitted, and it really could not upon the evidence be contested, that the plaintiff is entitled to recover as damages the sum which he had to pay to the shipowners in their action against him; and in substance, therefore, the only question which we now have to determine is whether or not the costs incurred by the plaintiff in defending that action can be recovered by him from the defendants in the present action. This question certainly arises under circumstances which would render it a very unreasonable state of the law, if the plaintiff could not recover those costs. The result of the course taken by the plaintiff has been that, with regard to a very serious and important portion of the claim made by the shipowners, he succeeded in that action, and has in consequence recovered from the plaintiffs therein some costs for which credit has to be given to the defendants in the present action; and the plaintiff contends that what he reasonably did in his own interest in defending the action has inured to the benefit of the present defendants, for the amount of the damages, which admittedly would be recoverable over against them, was thereby reduced from the 150 £., the amount which was claimed, to 20 £. It would be a strange thing, in my opinion, if the success of the defense, by which the damages were so reduced, prevented the plaintiff's recovering from the defendants the costs which he has incurred therein. I am very glad to say that in my view the law is not as contended for by the defendants. It was laid down in 1854 in the case of Hadley v. Baxendale, 9 Ex. 341, and has ever since been accepted as the guiding rule of law as to the measure of damages in an action of contract, that, when two parties have made a contract which one of them has broken, then, if the damages claimed in respect of the breach of contract are such as may be fairly and reasonably considered as arising naturally, i. e., according to the usual course of things, from the breach of contract itself or such as may reasonably be supposed to have been in the contemplation of the parties, at the time when they

made the contract, as the probable result of a breach of it, they are recoverable. Applying that test to the present case, is what happened here a consequence that might reasonably be expected to follow from the defendants' breach of contract? Both parties carried on business at Cardiff. The defendants knew what the plaintiff's business was, and that the coals were required for the purpose of supplying coals to steamers lying in the tidal harbor at Cardiff. Under the circumstances it is idle to suggest that it was not in the contemplation of the parties that a breach of the contract to supply coals would probably lead to such a claim against the plaintiff as was set up by the shipowners in this case. It would, under the circumstances, almost necessarily follow from a breach of the contract that such a claim would be made. It is also obvious that, if such a claim were made, it would be reasonable for the plaintiff, if, as was the case, he could not show that he was not liable, to take such steps as might be necessary to ensure that, at all events, the damages recovered should not be extravagant. It would be contrary to the ordinary principles of conduct in business that he should not endeavor to do this. This is exactly what the plaintiff did in the present case. The question is whether upon the principle laid down in Hadley v. Baxendale, *supra*, the plaintiff has not a right to recover these costs as reasonably incidental to the breach of contract. * * *

I think that the judgment must be affirmed. * * *

CHITTY, L. J. I am of the same opinion. I think the case falls within the rule laid down in Hadley v. Baxendale, *supra*, namely, that damages are recoverable in an action for breach of contract which may reasonably be supposed to have been in the contemplation of the parties when they made the contract as the probable consequences of a breach of it. The coal was sold in this case for a particular purpose as is shown upon the face of the contract itself. The plaintiff carried on business in the same town as the defendants, and they knew the nature of his business; and it appears from the terms of the letters which constitute the contract that they knew that the coal was wanted for steamers of which the steamer delayed was one. It is not necessary for me to repeat the facts at length, but I am satisfied that they were such as to bring the case within the doctrine of Hadley v. Baxendale, *supra*, so far as the damages recovered by the shipowners from the plaintiff are concerned. Then comes

the question as to the costs of the defense of the action brought by the shipowners against the plaintiff. Channell, J., has held that the course taken by the plaintiff in defending that action was reasonable. It was taken really not only in his own interest, but in that of the defendants, for the result of it was to reduce the damages from 150 £., which was the amount claimed, to 20 £., and, by taking the step of paying 20 £., into court, the plaintiff got from the shipowners the costs as between party and party of the proceedings subsequent to the payment into court. So the defense was one which in the result was for the benefit of the defendants. With regard to the authorities I have nothing to add except to say that I think that Hammond & Co. v. Bussey, 20 Q. B. D. 79, was rightly decided, and that, if there is any conflict between it and Baxendale v. London, Chatham and Dover Ry. Co., L. R. 10 Ex. 35, I think it ought to be followed rather than that case.

With regard to the scale upon which Channell, J. has allowed the costs, I think that he made the right order in confining them to such costs as were reasonably incurred by the plaintiff, namely, first those which he had to pay to the plaintiffs, in the action against him in respect of the proceedings prior to the payment into court, and secondly his own costs subsequent to that date, not meaning thereby any extravagant costs which he might choose to incur, but only reasonable costs upon the footing that the costs were to be paid by a third party.

Appeal dismissed.

As a general rule when a party is called upon to defend a suit, founded upon a wrong, for which he is held responsible in law without misfeasance on his part but because of the wrongful act of another, against whom he has a remedy over, counsel fees are the natural and reasonably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit. Westfield v. Mayo, 122 Mass. 100.

Counsel fees were allowed in an action for a breach of contract not to engage in the laundry business. My Laundry Co. v. Schmeling, 129 Wis. 597.

XV. EVIDENCE.

LOUISVILLE N. A. & C. R. R. *v.* SPARKS.

Indiana, 1895. 12 Ind. 410.

REINHARD, J. The appellees are husband and wife, and this action was brought by them against the appellant for damages to the real estate of the wife on account of the alleged negligence of the appellant in reconstructing a culvert near its railroad and the said real estate, causing the water to back, overflow, and stand upon the same, and injuring it in various ways, and injuring the crops thereon and the health of the appellee Fannie A. Sparks. In the court below the appellees recovered. At the trial, appellees' counsel propounded to John P. Sparks, the husband and witness of Fannie A. Sparks, the following question: "You may state to the jury what, in your judgment, is the depreciation in value of the property, and injury to the crops, on account of these overflows that you have detailed occurring since the sewer pipe was substituted for the culvert." To this question the appellant's counsel objected, because it sought to elicit from the witness a conclusion, and not a fact. The objection was overruled, and the appellant excepted. The witness then answered, "A thousand dollars," which was all the evidence given on the subject of the amount of damages. The question involved two elements of damages, viz., damages to the real estate, and damages to the growing crops. Each of these formed a proper subject of inquiry, which should have been pursued separately, although the object was not based upon the ground of the duplicity of the question.

Before determining the question before us, it is proper to ascertain what is the measure of damages for the injury to the land and to the growing crops. Injuries of the character here sued for are somewhat analogous to those involved in actions for damages for the wrongful appropriation of land for municipal corporations or railroad companies. In all such cases, where the injury is a permanent one, the measure of damages to the land is the diminished market value of the same by reason of the in-

jury, which is ascertained by proof of the market value before the injury and the market value after the injury, leaving it to the jury or court trying the cause to calculate the difference. If, however, the injury is not a permanent one, and the action does not recognize the right of the defendant to continue the obstruction, then it seems that damages can only be recovered up to the time of the commencement of the action, and that successive actions may be brought for successive injuries resulting from the same, and the measure of damages is found in the depreciation, not of the value of the land, but of the value of the use of the same, which is ascertained by proof of such value before and after the injury. 1 Suth. Dam. § 116; Sedg. Dam. (8th Ed.) § 942, and cases there cited; City of Ft. Wayne v. Hamilton, 132 Ind. 487; Railway Co. v. Eberle, 110 Ind. 542, 551.

Where the destruction or injury of the crops enters into the damages as an element, such damages are measured by proof of the value of the crops with and without the injury, leaving the court or jury to determine the difference as in the other case. We recognize the fact, however, that an injury resulting from such an act of negligence as the one here complained of may be in part permanent and in part temporary or transient. Thus, the land and buildings may have been permanently injured by washouts and gullies, so as to diminish the value of the entire tract or parcel, while, in addition, there may have been temporary injuries. In the present case the injury to the soil or real estate seems to have been of a permanent character, the other injuries complained of being injuries to the crops growing on the place, and injury to the health of the appellee Fannie A. Sparks. Hence the measure of damages for the injury to the real estate is the difference in its value by reason of the injuries, which is ascertained by proof of the value of the land before and after the same. Railroad Co. v. Smith, 6 Ind. App. 262.

Whatever damage was occasioned by injury to the crops should be proved by showing the difference in the value of such crops with and without the injury. Values, as counsel correctly contend, may be proved by the opinions of witnesses, for these are, after all, but estimates based upon the fact that other property of a similar character in the neighborhood has been or could be sold for similar prices. Such opinions may also be based upon the knowledge of the witness of the persons desiring to purchase the property and the price that they are offered for it.

There would have been, consequently, no valid objection to asking the witness his opinion as to the value of the property, or the difference in value before and after the injury, and possibly there may have been no error in asking him his opinion as to the depreciation; but that portion of the question which required the witness to give his judgment or estimate of the "injuries" to the crops was decidedly objectionable, for the reason that it was an attempt to substitute the conclusion or opinion of the witness for that of the jury on a question directly involved in the issues. What the injuries or damages, or any portion of them, are or were in this case, was for the jury, and not for the witness to decide. If it were left to the witness to pass judgment on what the amount of damages or injury is or should be, he might base his estimate upon things which do not lawfully enter into the consideration of the question as elements of damages. For this and other reasons, the witness should not be allowed to give his own conclusions or estimates of the damages. True, the damages may be proved by opinion evidence. Not, however, by opinions of what the injury amounts to in dollars and cents, but by opinions of the value of the crops before and after the injury, which is quite a different thing.

Judgment reversed.

SHARP *v.* UNITED STATES.

U. S. Supreme Court, 1903. 191 U. S. 341.

The plaintiff in error has sued out this writ for the purpose of reviewing a judgment of the United States circuit court of appeals for the third circuit, which affirmed a judgment of the district court of New Jersey, awarding damages to plaintiff in error for the taking of certain property of his on the Delaware river, near Fort Mott, in that state. The award of the jury was, in the opinion of the plaintiff in error, entirely inadequate as just compensation to him as the owner of the land for its taking by the government.

The jury found and assessed the value of the lands and the damages sustained at the sum of $12,000, to be paid the plaintiff in error by the United States. Judgment having been duly entered upon the award of the jury, an appeal was taken to the

circuit court of appeals, where the judgment was affirmed, and the case is now before us on writ of error sued out by the owner of the land.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court: * * *

The questions to be reviewed by this court arise upon exception appearing in the record taken upon the decisions of the court in relation to the admissibility of evidence, and also to the charge of the court as to the proper items to be considered by the jury in arriving at their verdict.

The errors assigned and upon which the argument was had in the circuit court of appeals were twelve in number. They are in substance the same here. The first seven refer to the rejection of evidence in regard to offers to purchase the lands from the plaintiff in error. It was held by the trial court, in response to the proposal to give such evidence, that the plaintiff in error could not testify to different offers he had received to purchase the property for hotel, residential, or amusement purposes, or for a ferry, or a railroad terminal, or to lease the property for hotel purposes.

Upon principle, we think the trial court was right in rejecting the evidence. It is, at most, a species of indirect evidence of the opinion of the person making such offer as to the value of the land. He may have so slight a knowledge on the subject as to render his opinion of no value, and inadmissible for that reason. He may have wanted the land for some particular purpose disconnected from its value. Pure speculation may have induced it, a willingness to take chances that some new use of the land might, in the end, prove profitable. There is no opportunity to cross-examine the person making the offer, to show these various facts. Again, it is of a nature entirely too uncertain, shadowy, and speculative to form any solid foundation for determining the value of the land which is sought to be taken in condemnation proceedings. If the offer were admissible, not only is it almost impossible to prove (if it exist) the lack of good faith in the person making the offer, but the circumstances of the parties at the time the offer was made as bearing upon the value of such offer may be very difficult, if not almost impossible to show. To be of the slightest value as evidence in any court, an offer must, of course, be an honest offer, made by an individual capable of forming a fair and intelligent judgment, really

desirous of purchasing, entirely able to do so, and to give the amount of money mentioned in the offer, for otherwise the offer would be but a vain thing. Whether the owner himself, while declining the offer, really believed in the good faith of the party making it, and in his ability and desire to pay the amount offered, if such offer should be accepted, or whether the offer was regarded as a mere idle remark, not intended for acceptance, would also be material upon the question of the bona fides of the refusal. Oral and not binding offers are so easily made and refused in a mere passing conversation, and under circumstances involving no responsibility on either side, as to cast no light upon the question of value. It is frequently very difficult to show precisely the situation under which these offers were made. In our judgment they do not tend to show value, and they are unsatisfactory, easy of fabrication, and even dangerous in their character as evidence upon this subject. Especially is this the case when the offers are proved only by the party to whom they are alleged to have been made, and not by the party making them. There is no chance to cross-examine as to the circumstances of the party making the offer in regard to good faith, etc. Evidence of this character is entirely different from evidence as to the price offered and accepted or rejected for articles which have a known and ready sale in the market. The price at the stock exchange of shares of stock in coroporations which are there offered for sale or dealt in is some evidence of the value of such shares. So evidence of prices current among dealers in those commodities which are the subject of frequent sales by them would also be proper to show value. This evidence is unlike that of offers to purchase real estate, and affords no ground for the admissibility of the latter.

A reference to the authorities shows them to be almost unanimous against receiving evidence of this kind. Counsel have cited many cases on this subject and they are contained in the margin. Fowler v. Middlesex County, 6 Allen, 92, 96; Wood v. Firemen's F. Ins. Co. 126 Mass. 316, 319; Thompson v. Boston, 148 Mass. 387; Anthony v. New York, P. & B. R. Co. 162 Mass. 60, Cochrane v. Com. 175 Mass. 299; Hine v. Manhattan R. Co. 132 N. Y. 477,; Keller v. Paine, 34 Hun, 167; Lawrence v. Metropolitan Elev. R. Co. 14 Daly, 502; Young v. Ttwood, 5 Hun, 234; Parke v. Seattle, 8 Wash. 78; Santa Ana v. Harlin, 99 Cal. 538; St. Joseph & D. C. R. Co. v. Orr, 8 Kan. 419;

Minnesota Belt Line R. & Transfer Co. v. Gluck, 45 Minn. 463; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 399. Most of them are clearly against the admissibility of the evidence, while some, which at first sight might be regarded as exceptional, will be found upon closer examination to recognize the general rule as already stated.

The next four assignments of error relate to the proper items of damage to be included in the award.

The owner offered to prove the probable use the government would make of the land for military purposes for which it was taken; also, that the use of the land for such military purposes would damage and depreciate the remaining and adjoining land; also, that if the land to be taken was used by the government for military purposes it would endanger the adjoining land of the owner for a long distance and make the removal of his buildings necessary. These offers were rejected, and the court held that the jury should not take into account prospective damages to the remaining and adjoining land of the owner, arising from the future use of the land sought to be taken from him for military purposes, although at the same time the court charged, if the evidence showed that by reason of the severance of the farms those which remained were made so small that it would be unprofitable to work them, whatever damage resulted therefrom should be given the owner. * * *

We are of opinion that the court was not bound to receive evidence upon any subject which it held to be not a proper item to make up the award to the owner. * * *

The important question is as to the admissibility of evidence of damages to the remaining lands of the owner which would probably flow from any particular and probable use by the government of the land to be taken. It is said by the plaintiff in error that just compensation consists not only in an award of the value of the lands which are taken, but also of any damage that may result to the portion of the tract which remains, on account of such taking and on account of the uses to which the land taken may, or probably will, be put, and he cites many cases to show the correctness of the rule which he asserts. * * *

Upon the facts which we have detailed, we think the plaintiff in error was not entitled to recover damages to the land not

taken because of the probable use to which the government would put the land it proposed to take. * * *

In Currie v. Waverly & N. Y. Bay R. Co. 52 N. J. L. 392, cited by counsel for plaintiff in error, for the proposition that where a part of the tract is taken for condemnation, damages to the remaining land shall be given, the court also says: "It is an established rule in law, in proceedings for condemnation of land, that the just compensation which the land owner is entitled to receive for his lands, and damages thereto, must be limited to the tract, a portion of which is actually taken. The propriety of this rule is quite apparent. It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance." It is enough to say that, in our opinion, the two other farms or tracts of land owned by plaintiff in error constituted such separate and independent parcels, as regards the land in question, that they cannot properly be spoken of as the residue of a tract of land from which the land in question was taken. * * *

Although denying the right to recover certain alleged damages to the land remaining, the court was not illiberal in the rules it adopted for ascertaining the compensation due for the taking of the land. It permitted the jury to consider not only the purposes to which the land taken had been put, but also, as bearing upon its value, the jury was directed to consider evidence as to the adaptability of the land for other than merely agricultural purposes; that while no merely speculative value was to be placed on the land, this possible adaptability was to be considered, and if, in the judgment of the jury, it was probable that the improvements which had been spoken of in the testimony would, within some reasonable time, be made, that was an element which might enter into their calculation in forming their estimate of the value of the land.

Therefore the jury was permitted to take into consideration the future possible building of a railroad in the neighborhood which would pass within a mile or so of Fort Mott, although no steps had yet been taken to build it; still, as there had been some talk of building it, and the railroad might thereafter be built, the jury were instructed that if they thought from the evidence it would be built within a reasonable time, and that if built it would enhance the value of the property, they might

take that fact into consideration as giving the then present actual value beyond that of an ordinary farm.

The same instructions were given in relation to a trolley road which it was supposed might be built to run near this land.

The jury was also permitted to consider the adaptability of the land for a hotel or cottage sites, and in addition, as already stated, the court charged that if the evidence showed that by reason of the severance of these farms they were made so small that it would be unprofitable to work them, the jury ought to give the damages arising therefrom. * * *

Upon a consideration of the whole record, we think there was no error committed upon the trial of the case before the jury, and the judgment of the Circuit Court of Appeals for the third circuit, affirming the judgment of the District Court for the district of New Jersey, is, therefore, affirmed.

POEHLMANN *v.* KERTZ.

Illinois, 1903. 204 Ill. 418.

WILKIN, J. This is an action for breach of promise of marriage, begun by Barbara Kertz, the appellee, against John W. Poehlmann, the appellant, in the superior court of Cook county. In accordance with the verdict of the jury, a judgment was entered for the plaintiff for $2,500. From an affirmance of that judgment in the Appellate Court for the First District, the appellant prosecutes this further appeal.

The appellant was a florist in Chicago, and was a widower, with two small children. In 1894 he became acquainted with Barbara Kertz, who was employed at his brother's home as a domestic. Four years later their acquaintance became more intimate, and they talked of marriage, and she testified that there was a positive agreement to become husband and wife. She then made a visit to her father's home, at Port Washington, Wis., and while there received from appellant several letters, the language of which plainly indicates that a promise of marriage had been made. Appellant visited her there, and presented her with a ring. After his return to Chicago, she heard nothing further from him. Some time thereafter she came to Chicago,

and called to ascertain why the correspondence had ceased, and was then informed he had changed his mind; he giving her to understand that their marriage would never take place, but assigning no reason for his conduct.

Upon the hearing, after plaintiff had made her proof, showing the facts substantially as herein set forth, the defendant, while testifying that no marriage contract had even been entered into between himself and the complainant, undertook to justify his refusal to marry her upon the ground that he learned she was a woman of unchaste character, having had sexual intercourse with one Weirich who appears as a witness for the defendant, and testified that he had on two or more occasions had illicit intercourse with her. She, in rebuttal, denied the statement made by Weirich, and was then asked by her counsel, "Did you ever have sexual intercourse with any man?" And she answered, "Mr. Poehlmann." Counsel for defendant objected, and asked that the answer be stricken out on the ground that the declaration contained no allegation of seduction. The court refused to strike out the answer, saying: "If you had objected to the question, I would have sustained the objection; but, having waited until the answer came, it is too late." Counsel for the defendant then, upon cross-examination, drew out the fact that she had yielded to the defendant only after his promise of marriage.

It is first contended that the court erred in permitting the testimony as to seduction, because the declaration contained no charge of that kind. Having waited too long before objecting to the question, as well as pursuing the witness with other questions on that subject, counsel for the defendant cannot now, as a matter of practice, complain of the evidence. But aside from this consideration, it was competent, under the pleadings, to prove the seduction, if it occurred in consequence of the promise. It is permitted, in such a case, to be shown in aggravation of the damages. Tubbs v. Van Kleek, 12 Ill. 446; Fidler v. McKinley, 21 Ill. 308. As is said in the case last cited (page 313): "In a case of a breach of promise, accompanied with a seduction, the injury is infinitely greater than where there is only a breach of promise. When there is a seduction there is a total loss of character, and all hopes of future happiness and usefulness are blighted, and certain degradation and future misery, if not crime, are its consequences. And when this

is produced by a breach of promise, and the fraud perpetrated upon the woman by the man entering into the engagement only to accomplish her seduction, the injury resulting therefrom is the immediate result and consequence of the breach of promise. If he were in good faith to perform his engagement and keep his promise, such consequences would not result; but, when he fails to do so, every consideration of justice requires him to repair the injury, as far as it may be done, by adequate damages." Counsel argues that seduction is not the natural result of a promise of marriage. Certainly not; but, when seduction follows in consequence of the promise degradation, loss of character and happiness are the direct result of a breach of that promise. In other words, the injury results from the breach, not the making of the contract. While there is a conflict of authority on the question as to whether evidence of seduction is admissible without an allegation in the declaration, this court is fully committed to the rule here announced. The foregoing decisions of Tubbs v. Van Kleek and Fidler v. McKinley, *supra*, were referred to with approval in Judy v. Sterrett, 153 Ill. 94. * * *

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

BRIGGS *v.* N. Y. C. & H. R. R. R. Co.

New York, 1903. 177 N. Y. 59.

O'BRIEN, J. On February 2, 1902, the plaintiff was injured in a collision on the defendant's belt line in Buffalo. It was a cold, stormy night, and a great deal of snow had fallen and drifted. Objects could not be seen very far through the snow, and it continued to storm after the plaintiff left the train. The car in which the plaintiff was seated had the seats arranged so that for a third of the length from either end of the car they were continuous along each side, and in the middle third of the car the seats were crosswise. The plaintiff and her aunt sat in the seats crosswise of the car, and after the train had stopped at one of the regular stopping places, and had just got started forward, an engine following in the rear collided with the train by running into the rear end of it. As soon as the headlight was seen approaching, the plaintiff and her aunt got up out of their

seats and went forward to the head end of their car. The plaintiff stood there, without supporting herself, until the collision occurred, which caused her to sit down involuntarily upon one of the iron arm rests, or divisions, between the individual seats along the side of the car. The collision appears to have been a slight one; nothing was broken about the car except the glass in the front door, and the train started up again and ran on to the next stop in the usual way. The plaintiff and her aunt having reached their destination, got out and walked for some 10 minutes through the storm and snow to the home of the aunt. It was Sunday evening, and plaintiff stayed there that night and the next day and night, and on Tuesday went home. The plaintiff then went with her mother to a physician at his office. The testimony tended to show that she went there every day for a week, and then every other day for two weeks, and then less frequently. It was claimed that the tip end of the spine was injured, resulting in serious consequences. The physician stated that when he first examined her he found a discoloration, not very much discolored, about two inches above the tip of the spine. He did not remember giving any local treatment, but gave her nerve sedatives. The jury rendered a verdict for the plaintiff of $6,000, which has been unanimously affirmed.

The extent of the injury and the damages were sought to be established by the plaintiff largely upon the testimony of medical experts. These experts were conducted by the learned counsel for the plaintiff, in his examination, through a very wide field of speculative inquiry. Much of this testimony appears in the record without exception, though it was constantly objected to by defendant's counsel. The testimony was not at all confined to the condition of the plaintiff at the time of the trial, which took place about eight months after the accident, but the experts were permitted to speculate upon the consequences of the alleged injury which might affect the plaintiff in the future. It was suggested that the injury might affect the bladder, the kidneys, and other organs of the body, and in the end become permanent. The following is a specimen of the testimony given by one of the plaintiff's experts, who had seen the plaintiff but once, and then long after the accident: "The bladder is a very bad master and a very good servant. If you humor it, or it gets into bad habits, it is almost impossible to correct them. I make this statement more than ordinarily positive, because I have seen a great many

of them. Because of this, irritability in this child is either from her general nervousness, or if it is from some central trouble—the result of the blow and the shock she has received—the outcome of it is, in my judgment, permanent. * * * The effects on this child, of this bladder, are of a general effect and local. The general effect of frequent urinating is harassing, inasmuch as it interferes with a person's going about. It is a pitiable thing sometimes. * * * The coats become thickened, just as much as a blacksmith's arm becomes larger, the bladder grows so that by and by it don't hold as much water, so that even if it was not sensitive the person could not retain it and would have to empty it, because it wouldn't retain it any longer. After it has lasted, it subjects the person to a long train of evils. A bladder which is enlarged and irritable is liable to have infection and inflammation set in, and when you add inflammation to irritability you have a condition of affairs that is most serious." The counsel for the defendant here interposed and said: "I object to this kind of testimony. It is of the most general character possible. I have objected to the question, and I want to object now to its being allowed to continue." The plaintiff's counsel thereupon replied: "If there is any part of the evidence that is not responsive, the counsel can move to strike it out, of course." The court thereupon stated. "I will let it stand," and thereupon the defendant's counsel excepted. In response to another question the witness, continuing, stated: "If the condition of the bladder—When that condition of the bladder sets in which I have described, it is only a step further for it to ascend to the kidneys. That always does not take place; but, as long as the lower urinary organs are in that state, there is no question about the jeopardy of the upper urinary organs."

It is undoubtedly true that in an action to recover damages for personal injuries the evidence of experts as to the future consequences which are expected to follow the injury are competent; but to authorize such evidence, however, the apprehended consequences must be such as, in the ordinary course of nature, are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating damages, and may not be proved. Strohm v. N. Y., L. E. & W. R. R. Co., 96 N. Y. 305; Tozer v. N. Y. C. & H. R. R. R. Co., 105 N. Y. 617; Jewell v. N. Y. C. & H. R.

R. R. Co., 27 App. Div. 500; Kleiner v. Third Ave. R. R. Co., 162 N. Y. 193; Smith v. N. Y. C. & H. R. R. R. Co., 164 N. Y. 491. We think this rule of evidence was violated in this case, since the learned trial judge permitted to stand, for the consideration of the jury, evidence which was speculative and conjectural. Indeed, the medical experts in the case, upon the examination of the plaintiff's counsel, were permitted to state numerous things which might result as a consequence of this injury. This is apparent from the extracts which we have referred to, and much more evidence of like character which is to be found in the record; therefore the learned trial judge, in permitting the examination, and in allowing the testimony to go into the record to be considered by the jury, gave the sanction of the court to testimony which was highly speculative and conjectural, and so far prejudicial to the defendant as to require a new trial. The objections made and exception taken were sufficient to direct the attention of the court to the point.

The judgment should therefore be reversed, and a new trial granted, costs to abide the event.

PARKER, C. J., and MARTIN, CULLEN, and WERNER, JJ., concur. GRAY, J., not sitting. HAIGHT, J., not voting.

Judgment reversed, etc.

HICKS *v.* MONARCH CYCLE MFG. CO.

New York, 1903. 176 N. Y. 111.

WERNER, J. In this action the plaintiff seeks to recover from the defendant $1,000 as damages for the failure of the defendant to return a bicycle and two models delivered to it under the following circumstances: The plaintiff was part owner of a patent upon an improved bicycle gear. During the month of February, 1898, he delivered to defendant's agents, at its salesroom in New York City, a bicycle to which was attached the patented device referred to, and also two models thereof, and left them there for the purpose of having defendant's agents examine the same with a view to inducing the defendant to adopt it upon the bicycles manufactured by it.

The plaintiff's testimony tended to show, and the jury had the right to find, that certain authorized agents of the defend-

ant examined plaintiff's bicycle with its attachments and the accompanying models, and expressed a desire to send it to defendant's factory in Chicago for the purpose of having it there examined by experts, and that this arrangement was agreed to, with the proviso that said property should be received at defendant's risk, at an agreed valuation of $1,000. The defendant admits the receipt of the property, the shipment thereof to its factory at Chicago, and its failure to return the same to the plaintiff, but denies that any valuation was ever agreed upon.

As part of the plaintiff's case he introduced in evidence a receipt signed by one Strout, an agent of the defendant, which was in the following form: "Recd. one bicycle from J. B. Hicks for examination and return. Value 1000.00." This receipt was signed by Strout individually, but was written on the back of a business card of the defendant, indicating that Strout was the manager of defendant's New York sales department. Defendant's witnesses gave evidence tending to show that the statement as to value was not in the receipt when it was signed, and that this statement had been written into the receipt after its delivery to the plaintiff.

The case was submitted to a jury, and plaintiff had a verdict for $1,000. The judgment entered upon that verdict was affirmed by a divided court. As there was some evidence to support the verdict, the present review must be confined to questions arising upon the rulings of the trial court in the reception and exclusion of evidence. We shall limit our discussion to a single exception, which we think is fatal to the judgment appealed from.

Upon the question of damages defendant called an expert in the manufacture of bicycles, and he was asked by defendant's counsel if he could tell as an expert what it would cost to reproduce by hand a model fashioned after the patent referred to. He answered in the affirmative, and was then asked what it would cost. This question was objected to by plaintiff's counsel as immaterial and incompetent, "and also upon the ground that it appears that the wheel was received and the models on the valuation of $1,000.00 by the company." The objection was sustained, and the defendant took an exception.

This evidence was clearly admissible. Whether the sum of $1,000, which the plaintiff claimed had been agreed upon as the value of the articles delivered by him to the defendant, was to be regarded as liquidated damages, or merely as a penalty, was

a question of intent to be deduced from the circumstances. If the sum named was an unreasonable price for the articles, evidence tending to show that fact would have had a very material bearing upon the question of damages. The rule is that "when the stipulated sum is disproportionate to presumable or probable damage, or to a readily ascertainable loss, the courts will treat it as a penalty, and will rely on the principle that the precise sum was not the essence of the agreement, but was in the nature of security for performance." Ward v. Hudson River Bldg. Co., 125 N. Y. 230; Curtis v. Van Bergh, 161 N. Y. 47; 3 Parsons on Contracts (6th Ed.) 157. * * * Considering the nature of the case, the question of damages was obviously an important one, and the erroneous ruling pointed out must have injuriously affected defendant's rights.

For the reasons stated the judgment should be reversed, and a new trial granted, with costs to abide the event.

MARTIN, VANN, and CULLEN, JJ., concur. PARKER, C. J., and BARTLETT and HAIGHT, JJ., dissent.

Judgment reversed, etc.

ROBINSON *v.* N. Y. ELEVATED R. R. Co.

New York, 1903. 175 N. Y. 221.

BARTLETT, J. This is the usual elevated railroad case to recover fee and rental damages, and under the unanimous decision the defendant railway companies are confined to the argument of legal errors duly raised by exceptions.

The counsel for the appellants insists that the learned trial judge admitted, over objection and exception, evidence regarding sales and rentals of specific pieces of property on Pearl street other than the premises in suit, in violation of the rule laid down by this court in the case of Jamieson v. Kings County Elevated Railway Co. (147 N. Y. 322, 325). Judge FINCH there said: "The plaintiff sought to prove the evil effect of the road in diminishing values by the process of calling the owners of property in the vicinity and proving, in each case, what the particular premises owned by the witness rented for before the road was built and what thereafter. There were objections and exceptions. Such a process is not permissible. Each piece of evi-

dence raised a collateral issue (Gouge v. Roberts, 53 N. Y. 619), and left the court to try a dozen issues over as many separate parcels of property. We have held such a mode of proof to be inadmissible. (Huntington v. Attrill, 118 N. Y. 365; Matter of Thompson, 127 N. Y. 463.) The elevated railroad cases in this court, to which the plaintiff refers us, give no warrant for such a mode of proof, but indicate that the general course and current of values must be shown by persons competent to speak, leaving to a cross-examination any inquiry into specific instances if such be deemed essential. Almost all the evidence of depreciation was of the erroneous character, and we cannot say that it may not have worked harm to the defendant."

The rule thus laid down was followed in Witmark v. New York Elevated R. R. Co. (149 N. Y. 393) and other cases.

The course of procedure under this rule may be thus briefly stated: Plaintiff having called as a witness an expert, is permitted to show the general course and current of values in the immediate vicinity, leaving to a cross-examination any inquiry into specific instances if such be deemed essential, the reason for the rule being that to permit evidence of the rental or fee value of other premises would raise in each case a collateral issue to be tried.

When the plaintiff's expert witness is cross-examined by the defendant as to specific instances it is competent upon a redirect examination for the plaintiff to make such full inquiry as he may be advised, as to each one of the specific instances brought out on cross-examination.

In the case at bar the plaintiffs swore their expert and conducted the direct examination in compliance with the rule; on cross-examination the defendants made inquiry as to about twelve pieces of other property in the immediate neighborhood; on redirect examination the plaintiffs examined the witness, over the objection and exception of the defendants, in regard to the fee or rental value of some sixteen additional pieces of property in the vicinity of the premises in suit.

We are of opinion that the introduction of evidence by the plaintiffs in regard to these additional pieces of property in the immediate neighborhood was in direct violation of the rule we have discussed.

It was for the plaintiffs to prove the general course of values and for the defendants to give evidence of specific instances.

If it be true that such evidence on the part of the defendants opened the door, as the respondents' counsel claims, for the introduction of as many additional pieces of property as they saw fit, it would result in raising numerous collateral issues and lead to the utter subversion of the rule laid down in the Jamieson case. * * *

Judgment reversed. All concur.

BARTOW *v.* ERIE R. R. CO.

New Jersey, 1905. 44 N. J. L. 12.

FORT, J. There are a number of grounds for reversal assigned in this case, but a careful examination of them leads us to conclude that there is but a single one that has substance. It is clear, under the proof, that the plaintiff could not have been nonsuited, nor a verdict directed for the defendant, upon the testimony.

There were no reversible errors in the rulings of the court upon the admissions of testimony excepted to, nor in the charge of the court, except in one respect, with relation to the allowance of damages for loss of profits in the business of the plaintiff. Exception is taken to the refusal of the court to charge the defendant's second request. That was as follows: "As there is no definite proof of the amount of the loss of profits sustained by the plaintiff in his business, no damages can be allowed for his loss of profits." And exception was also taken to what the court did say upon the question of the right of recovery by the plaintiff for loss of profits, and the leaving to the jury of the question whether, under the evidence, the plaintiff was making any profits from his business.

We think the second request should have been charged in this case in lieu of what the court did charge. There was no proof in the cause which would justify the jury in assessing any damages to the plaintiff for loss of profits. The only testimony given on the subject was that of the plaintiff himself, and that amounted to nothing more than a mere statement that he took in, in his business, from $1,000 to $1,100 per annum. This was proof only of the gross amount of his business. His books were not produced, nor was there given by him any estimate of the

expenses incident to the conducting of his business, or of the proportion of the expenses to the gross income. To justify a finding of loss of profits as a part of the verdict in a cause, the proof must be such as will show the jury with reasonable certainty what the profits alleged to have been lost would have been, but for the injury to the plaintiff. Profits must be proved. They cannot be estimated by the jury without data to justify their finding. East Jersey Water Co. v. Bigelow, 60 N. J. Law, 201. There being no proof of loss of profits in the business of the plaintiff which the jury could, under the proof, arrive at with reasonable certainty, it was error for the trial judge to submit the question of this class of damages to the jury, and he should have charged as requested.

For this error, and this alone, the judgment is reversed.

MARRIOTT *v.* WILLIAMS.

California, 1908. 152 Cal. 705.

SHAW, J. This is an action to recover damages for personal injuries inflicted upon the plaintiff by defendants. The jury rendered a verdict against the defendant Williams alone, and judgment was entered accordingly. The appeal is by the defendant Williams from an order denying his motion for a new trial.

The complaint alleges that the defendants entered plaintiff's home and there assaulted, beat, and wounded him, shooting him twice in the leg, breaking both bones below the knee, and piercing the fleshy part of the thigh, and bruising and cutting his head and hand. The answer admits that Beale inflicted the cuts and bruises on the head and hand, and that Williams shot plaintiff in the leg, but alleges that it was all done in necessary self-defense. Upon the trial, there was practically no controversy over the fact that Beale cut and bruised the plaintiff's head and hand by beating him with a pistol, and that Williams shot plaintiff in the thigh and below the knee, breaking the bones as alleged.

The plaintiff was the publisher of a weekly paper called the "News Letter." The defendants went to his house for the avowed purpose of demanding and procuring from him a retraction of a statement published in the paper. Upon entering

the hallway of the house, the plaintiff asked them for their hats, and took Beale's hat and started toward the rear of the hall to hang it on the hat rack. Before, or immediately after, this was done, Beale demanded of Marriott the retraction, and almost immediately struck the blows on the hand and head, while the two were engaged in a scuffle. Marriott broke away and started to run up the stairway, which was on the left side of the hallway. There were 20 steps in the stairway and about the fourteenth step from the bottom it made a quarter turn to the left to reach the floor above. When he had gone perhaps a little more than half way up, Williams shot at him three times, hitting him twice, as alleged. Upon receiving the shot which broke his leg, the plaintiff fell forward upon the upper steps and crawled to the upper floor and into his bedroom. Almost immediately his wife came into the room from the upper part of the stairway where, as she testified, she witnessed a part of the shooting. The defendants did not pursue Marriott, but stood on the lower floor during the altercation and shooting and until Marriott had disappeared, and then left the house.

The complaint alleged malice on the part of the defendants and asked exemplary damages. It was therefore proper to allow evidence of the defendants' wealth. Sloan v. Edwards, 61 Md. 100; Webb v. Gilman, 80 Me. 177; Draper v. Baker, 61 Wis. 450; Brown v. Evans (C. C.) 17 Fed. 912. Such evidence is admitted to enable the jury to determine what amount of punishment would be inflicted upon the defendant by compelling him to pay a given sum of money. Hence it is proper to show his wealth at the time of the trial, as was done here, instead of at the time of the injury. In mitigation of damages the defendants pleaded the publication of the articles above referred to, which, as they allege, were defamatory, and gave them just cause for great indignation. The court instructed the jury that these matters could not be considered in reduction of the actual damages accruing from his pain, physical injuries, loss of time, and moneys expended, or any other element of actual damages, but only in reduction of, or set-off against, the exemplary damages. That this was a correct exposition of the law is well settled. Goldsmith v. Joy, 61 Vt. 488; Badostain v. Grazide, 115 Cal. 429; Fenelon v. Butts, 53 Wis. 351; Corcoran v. Harran, 55 Wis. 122; Donnelly v. Harris, 41 Ill. 128. The assault and injury to the plaintiff were admitted. The answer that they were inflicted

in self-defense was an affirmative defense, which it was necessary for the defendants to establish by a preponderance of the evidence. A person who sues for a personal injury at the hands of another is not bound to prove, in the first instance, that he was not the aggressor and that the defendant did not act in self-defense. He must prove the assault and the injury, if they are denied. In so doing, he may incidentally bring out facts tending to support a plea of self-defense, and if so the defendant will be entitled to the benefit of such evidence. But the burden of proof to establish the self-defense remains with the defendant. There is no presumption that a bodily injury is justifiable, and the justification must be proven by him who asserts it. The instructions of the court embodying these propositions were properly given. Sellman v. Wheeler, 95 Md. 751; Gizler v. Witzel, 82 Ill. 326; Johnson v. Strong, 58 S. W. 430, 22 Ky. Law Rep. 577; Phillips v. Mann. 44 S. W. 379, 19 Ky. Law Rep. 1705; Rhinehart v. Whitehead, 64 Wis. 42.

In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability. Huddleson v. Borough, 111 Pa. 110; McCool v. Mahoney, 54 Cal. 492; Nichols v. Dunphy, 58 Cal. 607; Everrord v. Gabbert, 83 Ind. 492; Carney v. Reed, 11 Ind. 417; Cooley on Torts, p. 136; 1 Suth. Dam. § 140. The court did not err in instructing the jury to this effect.

There are some other objections to the charge to the jury, and there are other rulings in the admission of evidence which are questioned, but they are all either covered by what we have said, or they are too trivial to require notice.

The order is affirmed.

We concur: McFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; BEATTY, C. J.

GOMBERT *v.* N Y. C & H. R. R. R. CO.

N. Y. Court of Appeals, May, 1909.

WERNER, J.—In the City of North Tonawanda there is a highway known as Wheatfield street, which runs substantially east

and west and crosses at grade the tracks of the New York Central and Hudson River Railroad Company, which run practically north and south. The Lehigh Valley Railroad uses these tracks in its traffic between Buffalo and Niagara Falls. On the 2d day of October, 1905, the plaintiff was driving across these tracks on Wheatfield street, and collided with a southbound Lehigh Valley train. The crossing was equipped with gates operated by compressed air from a tower maintained by the New York Central Railroad Company, which was in charge of a gateman employed by that company. The plaintiff brought this action to recover for the injuries sustained in that collision, and both of the corporations above named were made parties defendant upon the theory that the one had been negligent in the operation of its gates and the supervision of its crossing, while the other had been negligent in the operation of its train. For the purposes of this appeal we may assume that the alleged negligence of the defendants and the plaintiff's alleged freedom from contributory negligence presented questions of fact for the jury. * * *

There is another exception in the case, however, which presents a much more serious questions. That is the exception taken to the ruling under which the court admitted evidence of the income, profit or earnings which the plaintiff had derived from his business during the three years preceding the accident. In the interrogatories of plaintiff's counsel the plaintiff's revenue from this source was called "earnings," but that is mere nomenclature which cannot be permitted to determine the inquiry whether the plaintiff's income had in fact been of such a character as to make it a proper element of the damages which he claimed the right to recover. As bearing upon that branch of the case it appeared that for a number of years prior to the accident the plaintiff had been a "building carpenter contractor." He gradually took entire contracts for certain amounts, although sometimes he furnished only the labor, at other times only the material, and again both material and labor. The extent of his business was not disclosed, but it appeared that he had a horse and wagon and employed men. From these facts the inference was clearly permissible that he must have had invested in his business some capital with which to carry out his contracts. The circumstance that he occasionally did some work with his own hands simply emphasizes the fact that

his principal occupation seems to have consisted in figuring on contracts, overseeing the work of his employees, and making such arrangements for materials and labor as the nature of his undertakings required. Upon these meagre facts we are to determine whether the income of the plaintiff for the three years preceding the accident falls within the category of personal earnings, the loss of which it was permissible to prove as an element of the damages suffered by him or whether it must be classed, either wholly or substantially, as uncertain business profits proceeding from invested capital which may not be considered in the process of ascertaining his loss. The rule of law which governs this phase of actions of this character has long been settled as an abstract legal proposition, but like many other legal rules, it sometimes encounters serious difficulties in the course of its application to particular facts. There are cases in which the facts are so definite and unequivocal as to necessarily relegate them to either one or the other of the two extremes of the rule. Between these extremes we find every degree and variety of fact and circumstance to which the rule must be applied, and occasionally these are so near the shadowy border line as to present troublesome questions. A few citations will serve as illustrations. In Masterton v. Village of Mt. Vernon (58 N. Y., 391, 396) the plaintiff was permitted to testify to his profits, year by year, in the business of buying and selling teas, in which the plaintiff had attended to the buying, which required great skill. The business had been extensive and had fallen off considerably after the injury to the plaintiff. There it was held to be error to have received evidence of the past profits of the plaintiff, because they were necessarily uncertain and fluctuating, and in stating that conclusion this court said: "The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These are circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged." This excerpt from the opinion in that case clearly discloses the reason of the rule. It is simply an adaptation to a special class of cases of that general rule of damages under which, at common law, the party injured

may recover for any loss that is definitely fixed or is capable of ascertainment with reasonable certainty. The later decisions upon the subject were reviewed by this court in the comparatively recent case of Kronold v. City of N. Y. (186 N. Y., 40, 44). There the plaintiff was engaged in selling Swiss embroideries, for which he took orders from sample designs or from drawings. He maintained an office, but its equipment and the expense of keeping it were so insignificant as compared with the amount which he earned as the result of personal canvassing and solicitation that it was held to have been error to have excluded proof of his earnings previous to the personal injury upon which he based his action. In that case some of the earlier decisions were reviewed, and these clearly demonstrate that when a claim for damages arising out of personal injuries is based upon the destruction or impairment of one's ability to perform labor or render service which is essentially and fundamentally personal in character, evidence may be given as to the nature and extent of the loss. This rule has been applied to lawyers, physicians, dentists, teachers, midwives, gaugers, pilots, book agents and other professional or semi-professional occupations in which the element of personal earnings has been held to predominate over a small and purely incidental investment of capital (Kronold v. City of N. Y., *supra;* Ehrgott v. Mayor, &c., of N. Y., 96 N. Y., 264; Simonin v. N. Y., L. E. & W. RR., 36 Hun, 214; Nash. v. Sharpe, 19 Hun, 364; Lynch v. B'klyn City RR., 123 N. Y., 657; Waldie v. B'klyn Heights RR., 78 App. Div., 557).

The latest case in which this court has had occasion to apply this rule is that of Weir v. Union R'y (188 N. Y., 416). That case may be fairly said to be the antithesis of the Kronold case, for it furnishes a very pointed illustration of the opposite extreme of the rule. There the plaintiff had rented a small place in which he established an oyster stand and lunch room. The supplies purchased and sold by the plaintiff varied in amount to such an extent that occasional changes had to be made in the number of persons employed as waiters and assistants. Sometimes there were two or three, and at other times only one. The plaintiff's income consisted of the difference between the gross receipts and the running expenses of the establishment, and it fluctuated from week to week. There the trial court received evidence of the plaintiff's weekly profits, and the ruling

was approved by the Appellate Division. When the case reached this court, however, the judgment was reversed upon the ground that the evidence was incompetent. That case is strikingly apposite to the discussion here, because it clearly shows that profits are not earnings simply because a business is very small, any more than earnings are necessarily to be considered as profits because they happen to be large. In other words, it is the character of the business or occupation and of the income derived therefrom that must determine the admissibility of such evidence in this class of actions. If the asserted loss consists of profits which are essentially the uncertain and fluctuating increment of invested capital, proof thereof is inadmissible no matter how small it may be; and, conversely, if the loss is due to the destruction or impairment of one's personal earning capacity the evidence thereof is not to be excluded simply because it may be large.

In the light of these distinctions the case at bar is easily classified. We think the evidence of the plaintiff's income from his business for the three years preceding the accident in which he suffered his injuries was incompetent because it related to profits depending in considerable measure upon capital invested in business, as distinguished from personal earnings. We have said that the evidence upon this subject was somewhat meagre, and so it was. That is, however, either the fault or the misfortune of the plaintiff. If there was in existence any further evidence in addition to that adduced which might have tended to show that the plaintiff's occupation was such as to place his loss of income in the category of personal earnings, it was in the plaintiff's possession and he should have produced it. If there was no such additional evidence he must abide by the usual and necessary inference that a contractor, engaged in the business of constructing buildings, in which he buys material, employs labor, oversees the work, and looks for his returns to the difference between what he gets and what he expends in performing his contracts, is not one who depends upon his personal earnings but upon the profits of his business. In either event the defendants are entitled to a new trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed. All concur.

The true rule of damages in tort is that the wrongdoer is liable for all injuries resulting directly from the wrongful act. It is error to charge the jury that only such damages can be recovered as defendant might reasonably be supposed to have contemplated as likely to result from his act. Vosburg v. Putney, 80 Wis. 523.

In an action for personal injuries, plaintiff, if entitled to recover compensatory damages, can get damages as follows: (1) for expenses incurred for doctors and nurses; (2) value of time lost during disability; (3) an award for pain and anxiety. Kline v. Santa Barbara Ry. Co., 150 Cal. 741.

In an action for personal injuries to a woman, evidence tending to show a miscarriage and a still-birth is admissible. Chicago Union & Traction Co. v. Ertrachter, 228 Ill. 114.

Proof of plaintiff's wages or earnings prior to the injury is admissible. Barnes v. Danville St. Ry. Co., 235 Ill. 566.

Proof as to possible speculative profits of a mill whose idleness was caused by a breakdown of machinery furnished by defendant, is inadmissible as remote. Callahan & Co. v. Chickasha Co., 17 Oklahoma 544.

A boy of thirteen was permanently injured. Evidence that he was obedient to his mother and economical in his habits can be admitted, as bearing on his earning capacity. Mill & Elevator Co. v. Anderson, 98 Tex. 156.

XVI. PROVINCE OF COURT AND JURY.

PHILLIPS *v.* LONDON & S. W. RAILWAY.

Court of Appeal, 1879. 5 Q. B. Div. 78.

This was an appeal by the defendants from a decision of the Queen's Bench Division directing a new trial. The application was made on the ground of insufficiency of damages and misdirection. The jury gave the plaintiff £7000. The plaintiff moved for a new trial, which was granted by the Queen's Bench Division on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the circumstances which ought to have been taken into account. The defendants appealed.

JAMES, L. J. In this case we are of opinion that we cannot on any of the points differ from the judgment of the Queen's Bench Division.

The first point, which is a very important one, relates to dissenting from the verdict of a jury upon a matter which, generally speaking, is considered to be within their exclusive province, that is to say, the amount of damages. We agree that judges have no right to overrule the verdict of a jury as to the amount of damages, merely because they take a different view, and think that if they had been the jury they would have given more or would have given less; still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice, be subject, to the supervision of a court of first instance, and if necessary of a court of appeal in this way, that is to say, if in the judgment of the court the damages are unreasonably large or unreasonably small, then the court is bound to send the matter for reconsideration by another jury. The Queen's Bench Division came to the conclusion in this case that the amount of the damages was unreasonably small, and for the reasons which were given by the Lord Chief Justice, pointing out certain topics which the jury could not have taken into consideration. I am of opinion, and I believe my colleagues are also of opinion, for the same reasons and upon the same grounds, that the dam-

ages are unreasonably small, to what extent of course we must not speculate, and have no business to say. We are, therefore, of opinion that the Queen's Bench Division was right in directing a new trial. * * *

Brett and Cotton, L. JJ., concurred.

Appeal dismissed.

GAMBRILL *v.* SCHOOLEY.

Maryland, 1901. 93 Md. 48.

Action of libel for dictation of defamatory matter to a confidential stenographer.

PEARCE, J. * * * The defendant's 9th prayer was properly rejected, because it precluded the jury from including in their verdict any allowance whatever for exemplary or punitive damages. Whenever the words charged in an action for slander or libel are actionable *per se*, as in this case, the damages are exclusively within the sound discretion of the jury. 13 Am. & Eng. Enc. Law, 432; Tripp v. Thomas, 3 Barn. & C. 427; Marks v. Jacobs, 76 Ind. 216; Nolan v. Traber, 49 Md. 460; Negley v. Farrow, 60 Md. 158. Whether exemplary damages shall be given or not is in all cases for the jury. Jerome v. Smith, 48 Vt. 230; Boardman v. Goldsmith, Id. 403. The assessment of damages is peculiarly the province of a jury in an action for libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. Davis v. Shepstone, 11 App. Cas. 191, per Lord Herschell. The jury must not be restricted by a direction not to give such damages. De Vaughn v. Heath, 37 Ala. 595. The plaintiff's 5th prayer is in accord with these principles, and was therefore properly granted. We cannot, however, avoid the conclusion that there was error in the rejection of the defendant's 15th prayer, which asked that the jury be instructed, if the defendant honestly and in good faith believed the statements contained in the letters to be true, and had grounds for such belief sufficient to satisfy an ordinarily prudent and cautious man that such statements were true, then the jury might take into consideration all the circumstances of the case, and, in the exercise of their discretion, award to the plaintiff nominal

damages merely. This prayer is very carefully guarded by the requirement to find honest belief of the truth of the charges, and of reasonable ground for such belief, and in its conclusion is substantially the converse of the proposition contained in the plaintiff's 5th prayer, which we have said was properly granted. By the rejection of the defendant's 15th prayer the jury were practically told they must give exemplary damages, and were absolutely refused the discretion to withhold them. But in no case has a plaintiff any legal right to exemplary damages. Such damages depend upon the case and the evidence and finding of the jury. Jerome v. Smith, *supra*. Where there is evidence of circumstances sufficient to uphold a verdict for exemplary damages, the question whether they shall be given or not is one for the jury. Boardman v. Goldsmith, 48 Vt. 403. And it is error to instruct them they must give exemplary damages. Sedg. Dam. 333; Hawk v. Ridgway, 33 Ill. 473. The words used here being actionable *per se*, although there was no proof of actual and substantial damages sustained by the publications to Miss Willis of the two letters, the jury could not properly have been deprived of their discretion to give exemplary damages if they found malice; nor could they, on the other hand, either by the granting of an erroneous instruction or the rejection of a proper one, be deprived of their discretion to refuse to award exemplary damages if they found no malice. For the error in the rejection of the defendant's 15th prayer, it will be necessary to reverse the judgment, that a new trial may be had. Judgment reversed, with costs to appellant above and below, and new trial awarded.

TATHWELL *v.* CITY OF CEDAR RAPIDS.

Iowa, 1903. 122 Iowa, 50.

Action to recover damages resulting from personal injuries received by plaintiff while driving in a street of a defendant city by reason of his horse stepping into a hole in the highway in or beside a culvert, the result being that plaintiff was thrown to the ground. Judgment for plaintiff on a former trial was reversed, and a new trial ordered. 114 Iowa, 180. On this trial verdict was returned for the plaintiff for $100 damages, which, on plaintiff's motion, was set aside as inadequate. From this ruling defendant appeals.

McCLAIN, J. There was a conflict in the evidence as to whether the street was defective at the place where plaintiff was injured, but the verdict of the jury for the plaintiff establishes the existence of a defect and the negligence of the city with reference thereto, and we have for consideration only this question: Did the trial judge err in setting aside the verdict on the ground that the damages awarded to plaintiff for the injury were inadequate? The right of jury trial, as uniformly recognized under the common-law system, involves the determination by the jury, rather than by the judge, of questions of fact, including the amount of damage to be given where compensation is for an unliquidated demand. Nevertheless, the trial courts have exercised from early times in the history of the common law the power to supervise the action of the jury, even as to the measure of damages, and to award a new trial where the verdict is not supported by the evidence and is manifestly unjust and perverse. And while it is uniformly held that the trial judge will interfere with the verdict of the jury as to matters of fact with reluctance, and only where, on the very face of the evidence, allowing every presumption in favor of the correctness of the jury's action, it is apparent to a reasonable mind that the verdict is clearly contrary to the evidence, yet the power of the judge to interfere in extreme cases is unquestionable. It has sometimes been said that the judge should not interfere where the verdict is supported by a scintilla of evidence; but the scintilla doctrine has been discarded in this state, and is not now generally recognized elsewhere. Meyer v. Houck, 85 Iowa, 319. The general scope and extent of the judge's supervisory power with reference to the jury's verdict as to questions of fact is well illustrated by the very first reported case in which the power appears to have been exercised—that of Wood v. Gunston, decided in 1655 by the Court of King's Bench (or, as it was called during the commonwealth, Upper Bench), found in Style's Report, on page 466. The action was upon the case for speaking scandalous words against the plaintiff, charging him, among other things, with being a traitor. The jury gave plaintiff one thousand five hundred pounds damages, whereupon the defendant moved for a new trial on the ground that the damages were excessive, and that the jury had favored the plaintiff. In opposition to this is was said in argument that after a verdict the partiality of the jury ought not to be ques-

tioned, nor was there any precedent for it "in our books of the law," and that it would be of dangerous consequence if it should be permitted, and the greatness of the damages cannot be a cause for a new trial. But counsel for the other party said that the verdict was a "packed business," else there could not have been so great damages, and that the court had power "in extraordinary cases such as this is to grant a new trial." The chief justice thereupon said: "It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary, discretion, and it is frequent in our books for the court to take notice of miscarriages of juries, and to grant new trials upon them. And it is for the people's benefit that it should be so, for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them, but it cannot be so intended with the court; wherefore let there be a new trial the next term, and the defendant shall pay full costs; and judgment to be upon this verdict to stand for security to pay what shall be recovered upon the next verdict." This case is especially interesting in connection with the present discussion, because it is one in which the assessment of damages was peculiarly within the province of the jury, and because the nature of the supervisory power of the trial judge is explained as being, in effect, to set aside a verdict for excessive damages in such cases which seem to have been the result of passion and prejudice, and not the deliberate exercise of judgment. That the practice of granting new trials under such circumstances has continued in all the courts administering the common law from the time of the case just cited to the present time is a matter of common knowledge with the profession, and citation of authorities would be superfluous. That the power is exercised to prevent miscarriage of justice by reason of the rendition of a verdict by the jury which is wholly unreasonable, in view of the testimony which is given in the presence of the court, is universally conceded.

But the question with which we are now more particularly concerned is whether this power of the trial judge may be exercised where the injustice consists in rendering a verdict for too small an amount. If the case is one in which the measure of damages is a question of law, the court has, of course, the same power to set aside a verdict for too small an amount as one which is excessive; and this is, in general, true without question where

the damages are capable of exact computation—that is, where the facts established by the verdict of the jury show as matter of law how much the recovery should be. In such cases the court may grant a new trial, unless the defendant will consent to a verdict for a larger amount, fixed by the court, than that found by the jury; just as in case of excessive damages under similar circumstances the court may reduce the amount for which the verdict shall be allowed to stand, on penalty of setting it aside if the successful party does not agree to the reduction. Carr v. Miner, 42 Ill. 179; James v. Morey, 44 Ill. 352. It seems to have been thought by some courts that the general supervisory power over verdicts, where the amount of damage is not capable of computation, and rests in the sound discretion of the jury, should not be exercised where the verdict is for too small an amount; at least not with the same freedom as in cases where it is excessive. Barker v. Dixie, 2 Strange, 1051; Pritchard v. Hewitt, 91 Mo. 547; Martin v. Atkinson, 7 Ga. 228. No such limitation on the supervisory power of the trial judge has been definitely established, and by the great weight of authority, both in England and America, the power to set aside the verdict, when manifestly inconsistent with the evidence, and the result of a misconception by the jury of their powers and duties, is as fully recognized where the verdict is inadequate as where it is excessive; and ample illustration of the exercise of this power is found in actions to recover damages for personal injuries or injury to the reputation, although in such cases the amount of damage is peculiarly within the jury's discretion. Phillips v. London & S. W. R. Co., 5 Q. B. D. 781; Robinson v. Town of Waupaca, 77 Wis. 544; Whitney v. Milwaukee, 65 Wis. 409; Caldwell v. Vicksburg, S. & P. R. Co., 41 La. Ann. 624; Benton v. Collins, 125 N. C. 83; McNeil v. Lyons, 20 R. I. 672; Lee v. Publishers, George Knapp & Co., 137 Mo. 385; McDonald v. Walter, 40 N. Y. 551; Carter v. Wells, Fargo & Co. (C. C.) 64 Fed. 1007. * * * We do not hold that the trial judge may substitute his judgment of the credibility of the witness in place of the judgment which the jury has exercised, but we do say that the trial judge may, if he finds that the jury have failed to allow the amount of damages shown by uncontradicted testimony, set aside the verdict as in conflict with the evidence and award a new trial.

The ruling of the lower court was therefore correct, and it is affirmed.

CHICAGO CITY RY. CO. *v.* GEMMILL.

Illinois, 1904. 209 Ill. 638.

HAND, C. J. This was an action on the case, commenced in the circuit court of Cook county by Michael Sheehan against the appellant to recover damages for a personal injury alleged to have been sustained by him through the negligence of the appellant. The declaration contained four counts. The plea of not guilty was filed. A trial resulted in a verdict for the sum of $12,500, and, a motion for a new trial having been interposed, the trial court required the plaintiff to remit the sum of $6,500, otherwise the motion for a new trial would be granted, whereupon the plaintiff entered a remittitur for that amount, and the motion for a new trial was overruled, and judgment rendered on the verdict for $6,000. The appellant prosecuted an appeal to the Appellate Court for the First District, where the judgment was affirmed, and a further appeal has been prosecuted to this court.

During the pendency of the appeal in the Appellate Court Michael Sheehan died, and Howard S. Gemmill, his administrator, was substituted as appellee, and appears in that capacity in this court.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved the court to peremptorily instruct the jury to return a verdict in favor of the defendant, which the court declined to do, and the action of the court in that regard has been assigned as error. It appeared from the uncontradicted evidence that Michael Sheehan, who was at the time of the injury in the employ of the Chicago House-wrecking Company as a teamster, was driving a horse hitched to a loaded wagon upon Thirty-Fifth street, which runs east and west, in the city of Chicago; that the wrecking company's place of business and yards are located on the southwest corner of Iron and Thirty-Fifth streets, the entrance thereto being on Thirty-Fifth street, about 225 feet west of Iron street; that the appellant operated a double-track electric street railway on Thirty-Fifth street, its west-bound cars running upon the north

track and its east-bound cars running upon the south track; that as Sheehan approached the entrance to the yards of the wrecking company from the east, it being after 6 o'clock, he discovered the gate was closed. He stopped the horse on the north side of the street, immediately in front of the entrance, got down from the wagon, went across the street to the gate, and notified the watchman to open it, which the watchman did. He then went back, got upon the wagon, and started to drive across the street into the wrecking company's yard. A car of appellant was approaching from the west upon the south track. As Sheehan drove upon that track the car struck the wagon, and knocked the horse down, and threw Sheehan off upon the ground, from which fall his hip was crushed and he was otherwise injured. At the time of the injury it was daylight; the track was dry; and the view up and down Thirty-Fifth street, at the place of the injury, for a considerable distance was unobstructed. The evidence was conflicting as to the rate of speed at which the car was running and its distance west of the entrance to the wrecking company's yards when Sheehan started to cross the tracks; also as to whether the gong was sounded by the motorman, or Sheehan looked in the direction of the approaching car. Sheehan testified the car was 300 feet or more west of the entrance to the yards of the wrecking company when he started to drive across the tracks; that from the position he was in on the load he could not judge accurately as to the rate of speed at which the car approached the wagon; that when he drove upon the tracks the car was 150 feet or more west of him, and that it struck the rear part of the wagon. Other witnesses testified the car was running at a high rate of speed, that the wagon was badly broken, and that some of the windows in the car were knocked out at the time of the collision. * * *

It is assigned as error that the court improperly gave to the jury the following instruction: "The jury are instructed that if you find for the plaintiff in this case you will be required to determine the amount of his damages, and in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should take into consideration all the facts and circumstances in evidence before them, and the nature and extent of plaintiff's physical injuries, if any, testified about in this case, so far as shown by the evidence; his suffering in body and in mind, if any, resulting from

such injuries; and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, he will sustain by reason of such injuries." The criticism made upon the instruction is that it informs the jury that in determining the amount of damages that the plaintiff is entitled to recover, if any, they have a right to and should take into consideration all the facts and circumstances in evidence before them. While the instruction would have been more accurate had it limited the jury to the consideration of the facts and circumstances attending the injury, as was done in the case of Gartside Coal Co. v. Turk, 147 Ill. 120, we are of the opinion the jury were not misled by the instruction. An instruction in substantially the above form was approved by this court in Hannibal & St. Joseph Railroad Co. v. Martin, 111 Ill. 219; West Chicago Street Railroad Co. v. Carr, 170 Ill. 478, West Chicago Street Railroad Co. v. Johnson, 180 Ill. 285; Cicero & Proviso Street Railway Co. v. Brown, 193 Ill. 274; and Chicago Terminal Transfer Railroad Co. v. Gruss, 200 Ill. 195. The giving of the instruction was not prejudicial error. * * *

It is further assigned as error that the court erred in entering judgment on the verdict for $6,000, the amount remaining after the remittitur was entered. In Loewenthal v. Streng, 90 Ill. 74, which was an action on the case for malicious prosecution, a verdict was rendered for $10,000. A remittitur of $4,000 was entered, and a judgment was then rendered on the verdict for $6,000. It was there said that where a verdict is so flagrantly excessive as to be only accounted for on the ground of prejudice, passion or misconception, a remittitur will not cure the verdict. When that case was decided, this court in that class of cases reviewed questions of fact as well as of law, which is not the case since the organization of the Appellate Courts. In the case of North Chicago Street Railroad Co. v. Wrixon, 150 Ill. 532, after an exhaustive review of the authorities in this state, it was said (page 535, 150 Ill.): "We are committed to the practice of allowing remittiturs in actions *ex delicto*, both in the trial and appellate courts, to such sum as shall to the court seem not excessive, and affirming as to the balance of the judgment;" and the practice therein referred to is now too well established to be questioned. West Chicago Street Railroad Co. v. Musa, 180 Ill. 130; Chicago & Alton Railroad Co. v. Lewandowski, 190 Ill. 301. In the Musa Case it was held it was the

province of the Appellate Court to determine whether, in view of all the facts of the case, the damages were excessive, and if, in the view of that court, they were, the error might be cured by a remittitur in that court; and that the judgment of the Appellate Court in that regard, being upon a question of fact, would be binding upon this court.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

SOUTHERN PACIFIC CO. *v.* FITCHETT.

Arizona, 1905. 9 Ariz. 128.

Action by railroad passenger for damages.

The jury returned the following verdict against the appellant:

"We, the jury duly impaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff, and assess his damages at:

$48 20,	railroad ticket.
22 00,	expenses in Tucson.
1,000 00,	injured feelings.
$1,070 20	

"C. M. Zander, Foreman."

It was the expressed view of the trial court that the award by the jury of $1,000 for the injury to the feelings of the appellee was clearly in excess of what was just and proper as a money compensation therefor. It must also have appeared to the court, as it conclusively does to us, that this verdict, so disproportionate to the injury proved, was not the result of cool and dispassionate consideration of the jury. Under these circumstances, did the court have the power, against the objection of either party, to render judgment for the balance of the verdict, after remitting therefrom the part which it deemed excessive? Upon this question there is an apparent conflict in the authorities, attributable in some measure to the varying provisions of the local Codes. There are actions, the subject of which has a contract, commercial, or other established standard of valuation, where the amount of the verdict, when the facts

are shown, becomes generally mere matter of computation. It seems to be well settled that in this class of actions any excess in the verdict above what the evidence satisfactorily establishes may, with the assent of the party in whose favor it is rendered, be eliminated by remittitur, and judgment entered for the residue. "The exercise of such power," it has been said, "is sanctioned on the theory that the excess arises from misapprehension of the law or the facts, or error in computation, not necessarily permeating and vitiating the entire verdict, and which it is competent to correct, with the assent of the party whom alone the correction could prejudice, by striking therefrom any distinct item, or excess in the computation of its value, appearing to be unsupported by the evidence." The rule is a salutary one, and, when employed with discretion, terminates litigation while promoting justice. But in that class of actions in which the opinion of the jury, unaided by any known standard of valuation, determines the magnitude of the recovery, the power of the court over an excessive verdict is considered by many authorities to be quite different. Although the verdict, if purged of any supposed excess, might, in the opinion of the court, be well sustained as to the residue by the facts disclosed, yet the manifest presence and influence of passion, prejudice, or partiality in producing the excess vitiates the verdict in toto, and, according to these authorities, excludes the power of the court to validate or save any part of it against the consent of either party. It was a theory of the common law that the money value of personal wrongs which could have no certain standard of measurement should not be committed to the arbitrament of a single mind, but should be measured by the average of impartial opinion, of which the concurrence of 12 minds, uninfluenced by passion, resentment, or corruption, would be a fair expression. "It is the peculiar province of the jury," observes a noted law writer, "to decide such cases under appropriate instructions from the court, and the law does not recognize in the latter the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake, or, in other words, that it is the result of accident or perverted

judgment, and not of cool and impartial deliberation. When the verdict is thus excessive or deficient, the trial court, in its discretion, will interpose and set it aside." 2 Suth. Dam. (3d Ed.) § 459. But when a verdict is tainted by the presence of any such infirmities, is it safe to permit any portion of it to stand as the basis of a judgment? If recklessness has controlled in measuring the extent, may it not be probable that it also controlled in determining the right of recovery? In Southern Pac. Co. v. Tomlinson, 4 Ariz. 126, 33 Pac. 710, this court, speaking through Mr. Justice Sloan, said: "A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. * * * Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case." The case which evoked the foregoing expression was an action based upon injuries resulting in death. It is therefore readily distinguishable from the case as bar, in the point that the damages therein were susceptible of accurate computation from the evidence. The Supreme Court of Georgia holds that, in suits to recover for personal injuries, it is not competent for the trial court to say that the verdict shall stand for any definite sum less than it designates, as a condition for refusing a new trial. Railway Co. v. Harper, 70 Ga. 119. The rule in that state is that, where general damages have been recovered for a personal tort, if they be so excessive as to lead the court to suspect bias or prejudice, the judge has no power to require a portion of the damages written off, and thereupon refuse a new trial; but it is otherwise where the damages claimed are special, and from the testimony can with accuracy be computed in dollars and cents, as in cases of tortious homicides. Railway Co. v. Godkin, 104 Ga. 655. In Kentucky the trial court cannot, in an action to recover for personal injuries, require the plaintiff, in order to avoid a new trial, to accept a judgment for less than the verdict awards; and, if such judgment is acepted under protest, it will be reversed either upon the defendant's appeal or upon cross-appeal. Railway Co. v. Earl's Adm'r, 94 Ky. 368. The Texas courts denied the power to require a remittitur in ac-

tions to recover damages for torts, but the rule has been changed by statute. Railway Co. v. Syfan, 91 Tex. 562. The same view of the main question seems to be favored in West Virginia. Vinal v. Core, 18 W. Va. 1; Unfried v. Railroad Co., 34 W. Va. 260. It is also indorsed in Arkansas, Railway Co. v. Hall, 53 Ark. 7. This is also the view in Missouri as to the Supreme Court, but not as to the trial courts. In Gurley v. Railway Co., 104 Mo. 211, it was said by the former court: "Whenever the verdict does not, upon its face, appear to be the result of passion or prejudice, it is wholly within the province of the jury; but, when it does so appear, then it ought to be set aside. We have no scales by which we can determine what portion is just, and the result of reason, based upon the evidence, and what part is poisoned with prejudice and passion. We do not think it within our province to assess the damages. When we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and a different verdict. We think the only logical course in such cases is to let the verdict stand or set it aside as an entirety." The Supreme Court of Colorado had this subject under discussion in a recent and well-considered case, in which the authorities were reviewed, and an attempt made to distinguish and harmonize them. The conclusion there reached was that in an action for personal injuries, where the verdict was excessive, and apparently the result of passion, or prejudice, the trial court could not order a remittitur of the excessive part and give judgment for the residue, but must grant a new trial. Davis Ironworks Co. v. White (Colo. Sup.) 71 Pac. 384. The Supreme Court of the United States, speaking through Mr. Justice White, in Hansen v. Boyd, 161 U. S. 397, said: "The rule has been adopted by this court that it is proper either for the trial court upon an application for a new trial, or for an appellate court in reviewing a judgment, to permit the party in whose favor a verdict or judgment has been returned or entered to avoid the granting of a new trial on account of error affecting only a part thereof, by entering a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same." The practice of ordering a remittitur within the limits of the last-mentioned rule involves no departure from sound principle, and is expressly sanctioned by our Code. Paragraphs 1450, 1455, Rev. St. 1901. Authorities are also to be found which will sup-

port the practice in both appellate and trial courts of reducing judgments and verdicts, even in those cases where no standard of measurement exists, and although it be apparent that the jury's excessive finding must have been influenced by passion, prejudice, or a perverse disregard of justice, but we are disposed to question their soundness in principle.

In the case at bar the trial court was of the opinion that more than half of the damages awarded for the appellee's "injured feelings" were excessive. It was impossible to tell how the jury made up their verdict, but it was evidently not the result of cool and dispassionate consideration. Under these circumstances, we think it was not the province of the court to substitute its own estimate of the damages for that which it had rejected, but that the question of the proper sum to be awarded, was one of fact, which should have been submitted to the determination of another jury. We are the more readily led to this view when we consider that the language of our Code is that "in all cases, both at law and in equity, either party shall have the right to submit all issues of fact to a jury." Paragraph 1398, *Id.* Whatever may be the effect of this provision as to equity cases, it was the manifest intention of the Legislature to enact as strongly as words could express its will in favor of the right to have questions of fact left to the determination of the jury.

Other errors are assigned by the appellant, but, as the case will have to be reversed because of the action of the court with respect to the remittitur, and the other questions presented may not arise upon another trial, we deem it unnecessary to discuss them.

The judgment and order appealed from will be reversed, and the cause remanded to the district court for a new trial.

SLOAN and DOAN, JJ., concur.

The judge should charge the jury as to the true measure of damages. "The rule by which damages are to be established is a question of law to be decided by the court. The extent of damages sustained as the consequence of defendant's act is within the province of the jury." B. & O. R. R. v. Carr. 71 Md. 135.

Where the court deems excessive a verdict for damages which are in their nature incapable of exact ascertainment, as for injured feelings, and is satisfied that the verdict was due to passion and prejudice, it is not for the court to substitute its own estimate of the damages for that which it had rejected by ordering a remittitur. The Southern Pacific Co. v. Fitchett, 9 Ariz. 125.

In an action of libel the amount of damage is peculiarly within the province of the jury. When in their judgment the defendant was incited by actual malice or acted wantonly or recklessly, they may give exemplary damages. Holmes v. Jones, 147 N. Y. 59.

It is within the province of the jury, in a case of personal injuries, to award such damages as they think proper, considering the permanent injury, the resulting disability, the time lost and mental suffering endured. Atoka C. & M. Co. v. Miller, 7 Ind. Ter. Rep. 106.

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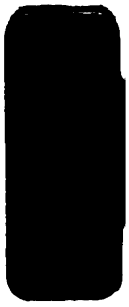
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